IN THE

Supreme Court of the United States

October Term, 1976

No. 76-718

MICHAEL A. S. MAKRIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Michael A. S. Makris petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 23, 1976.

OPINIONS BELOW

There is no reported or unreported decision on the trial of this matter. The first opinion of the Fifth Circuit Court of Appeals is *United States v. Makris*, 483 F.2d 1082 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974), Appendix A hereto. The district court opinion on remand is *United States v. Makris*, 398 F. Supp. 507 (S.D. Tex. 1975), Appendix B hereto. The subsequent appellate court decision is *United States v. Makris*, 535 F.2d 899 (5th Cir. 1976), Appendix C hereto.

JURISDICTION

Petitioner Makris was indicted for perjury under 18 U.S.C. § 1621, in the Southern District of Texas, convicted, and sentenced on August 30, 1972. The Fifth Circuit Court of Appeals affirmed in part and reversed and remanded in part. The district court entered its decision on remand on July 16, 1975. The Fifth Circuit Court of Appeals then affirmed on July 23, 1976. A timely petition for rehearing and suggestion for rehearing en banc was filed on August 6, 1976, and that petition was denied on September 22, 1976. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where, as here, the district court wrongfully denies a motion for a pretrial competency hearing under 18 U.S.C. § 4244, the Ninth and District of Columbia Circuits require a post-appeal competency hearing and a retrial if the defendant is found to be then competent. The Fifth Circuit rejects this rule and instead allows the trial court to determine competency *nunc pro tunc*, years after the event. Which rule should prevail?

2. Should a *nunc pro tunc* competency determination be supported by expert evidence?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes are:

1. United States Constitution, Amendment 5:

"No person shall * * * be deprived of life, liberty or property, without due process of law * * * *."

2. United States Constitution, Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the assistance of counsel for his defense."

3. 18 U.S.C. § 4244:

"Whenever after arrest and prior to the imposition of sentence [upon an appropriate motion challenging whether the accused is] so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, . . . the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . . If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. . . ." (Because of the length of this provision, it is provided in toto in Appendix D hereto.)

STATEMENT OF THE CASE

In April, 1970, Michael A. S. Makris underwent surgery for removal of a pituitary adenoma. The operation involved extensive manipulation of the frontal lobes of his brain as well as destruction of the pituitary gland. (398 F. Supp. 508; App. B). The result was organic brain syndrome leaving Makris mentally impaired and with an endocrinological deficiency. (Report of 6/2/72 of Dr. Vogt, Trial Ex. 12; Tr. T. 321, 230).[1] In December, 1970, Makris, without the assistance of counsel, testified at a Securities and Exchange Commission hearing. (Trial Ex. 4, at 1,

[1] "Tr. T." references are to the reporter's transcript of the trial.

4).[2] Thereafter, Makris was indicted for perjuring himself at that SEC hearing.

Prior to trial the Government moved pursuant to 18 U.S.C. § 4244, for the appointment of a psychiatrist to examine Makris to report to the court whether Makris was competent to stand trial. (483 F.2d at 1089; App. A. at 1a-2a). The court appointed Dr. Alfred Vogt, who reported to the court that Makris suffered from a significantly impaired capacity to deal with stressful situations; that while in non-stress circumstances Makris appeared normal and seemed to respond rationally, in situations which he perceived as threatening, he might panic and his recognition of the situation and his responses to it would become random, unpredictable and uncontrollable. (483 F.2d at 1089; App. A. at 2a). In short, Dr. Vogt found that Makris was incompetent.

Despite Dr. Vogt's findings, the trial judge ruled that Dr. Vogt's report did not indicate a state of present insanity or mental incompetency as described in 18 U.S.C. § 4244 and, therefore, denied the motion for a competency hearing. (483 F.2d 1091; App. A. at 3a).

Upon appeal the Fifth Circuit reversed, ruling that in the light of the Vogt report and 18 U.S.C. § 4244, the trial court should have held a hearing on the issue of the ability of the defendant to assist his counsel at trial. (483 F.2d 1092; App. A. at 3a-4a).

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[2]Makris's statements before the SEC were unquestionably false and unquestionably material. They were also unquestionably bizarre, because their falsity was ridiculously easy to establish. He denied a conversation to which there were two witnesses; he denied any knowledge of a company with which he had been deeply involved (483 F.2d 1087-88; App. A.

The Fifth Circuit rejected by name the Ninth and District of Columbia Circuits' decisions holding that a successful appeal for failure to comply with 18 U.S.C. § 4244 results in vacating the judgment, a competency hearing, and a new trial if the defendant is presently competent to stand trial. (483 F.2d at 1092 n.8; App. A. at 5a). Instead, it ordered the district court to determine first whether an adequate and meaningful determination could be had as to the competency of Makris two years before and, if so, to hold such a hearing, entering its conclusion retroactively or *nunc pro tunc.*[3]

In December, 1974, two and one-half years after the trial, the competency hearing was held. During that proceeding, Makris collapsed in the courtroom and was hospitalized and the court proceeded without him. (398 F. Supp. 509; App. B at 3b).

By the time of the competency hearing the defendant had been examined by many medical experts. Their reports were before the court, and many of them testified. The Government's experts were Dr. Charalampous and doctors from the Medical Center For Federal Prisoners at Springfield, Missouri. They had examined Makris in April - May, 1974. They were unable to give an opinion on competency in 1972. Significantly, they felt a determination of competency in 1972 had to be made by those who had examined Makris *at that time.* (CH T. 241-42, 371-72).[4]

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[3]Certiorari from this decision was denied, 415 U.S. 914 (1974). The Government argued that the conflict did not warrant resolution by this Court and that in any case the petition was premature since there was no final judgment.

[4]"CH T." references are to the reporter's transcript of the Competency Hearing held *December 3,* 1974.

Dr. Vogt, the original court appointed examiner, testified categorically that Makris "certainly wasn't" competent at the time of trial. (CH T. 747). This diagnosis was confirmed by Dr. Riley, who had examined Makris twice in June, 1972. (CH T. 607-08).

The Menninger Clinic gave Makris an exceedingly thorough evaluation in September, 1974, by a battery of doctors and psychologists. Several of them testified at the competency hearing. The general import of their reports and testimony was that Makris was not competent to stand trial in June, 1972; they were agreed that in stressful situations, Makris might not act in a rational and competent manner. For illustration, Dr. Nagaswami testified that stress incapacitated Makris's brain (CH T. 708) and that the stress of a trial would bring on seizures (CH T. 713). As an analogy, Dr. Nagaswami said that if he, Dr. Nagaswami, were asked to give an opinion on neurology, this would not produce stress in him, but if he were asked to give an opinion of law, an area with which he is unfamiliar, this would cause him stress. So also with Makris (CH T. 725). See also testimony of Dr. Settle (CH T. 507-10); Report of Dr. Goldstein (CH Ex. 14, at 5); and Report of Menninger Clinic (CH Exs. 14, 15).

The trial court expressly and by name rejected the Menninger testimony to which it could "give little weight" because they "examined the defendant more than two years after trial" (398 F. Supp. at 516; App. B. at 18b). The testimony was minimized because:

> ". . . the opinions of the Menninger staff were rendered with the experts knowing little or nothing of the defendant's history, except what the defendant and his wife told them. . . . they were generally unaware that they were dealing with an exceptional individual who was highly motivated to project his psychic and physical condition in as serious a light as possible . . . ." *Id.*

The court declared himself unpersuaded by the fact:

> ". . . that lay testimony must be discounted because the defendant's impairment can be discerned only by the expert eye after close examination. Any impairment which is that obscure and esoteric can scarcely be of sufficient magnitude to render the defendant unable to understand basically what is going on in a court of law and unable to confer intelligently with his counsel in his own defense. . . ." *Id.*

Instead, the court relied on its own opinion that for Makris the stress of the business world was no different than that of being on trial for a felony and reasoned that since Makris functioned reasonably in his world of high finance, he was competent to stand trial.

This "obscure and esoteric impairment" in fact has already resulted in additional brain surgery on this defendant for the removal of another tumor. See statement of Dr. Goodrich, July 28, 1976, describing the removal on July 19, 1976, of a "quite large tumor and a requirement for radiation therapy" (Exhibit to Petition for Rehearing, August, 1976). This was a recurrence of the original tumor. The judge's confidence in what the layman could see led him to give no account to Dr. Goldstein's statement at the hearing, now only too clearly proved true, that ". . . I felt that the findings could be explained by a lesion deep in the brain and in the center of the brain" (CH T. 665) or to Dr. Riley's suspicions of the same thing (CH T. 601, 617).

The Fifth Circuit affirmed. It will be recalled that the Fifth Circuit had remanded to the trial court to answer two questions; first, whether it was possible to make a retroactive estimate of the competency of Makris and

second, what that competency was. The trial court accepted expert testimony on the first point and rejected all expert testimony on the second point. This the Fifth Circuit approved. It thus necessarily held that the *nunc pro tunc* competency determination could reject all expert evidence.

REASONS FOR GRANTING THE WRIT

1. This case vividly demonstrates why this Court should resolve the conflict between the Circuits on the propriety of *nunc pro tunc*[5] competency determinations and hold that the proper remedy following a successful appeal arising from a district court's failure to comply with 18 U.S.C. § 4244 is vacation of the judgment and a contemporaneous competency determination, not a *nunc pro tunc* competency determination.[6]

The shortest and most simple reason for upholding the District of Columbia and the Ninth Circuit rule is that the

[5]Whatever else this procedure is, it is a highly unconventional use of the term to call it "*nunc pro tunc*". " '[T]he purpose of a *nunc pro tunc* entry is to correct mistakes of the clerk or other court officer, or inadvertences of counsel, or to settle defects or omissions in the record, so that it will show what actually took place. It is not, on the other hand, the function of such entry . . . to make the record show that which never existed . . . .' *Mattbies v. Railroad Retirement Board*, 341 F.2d 243 (8th Cir. 1965). *Accord, W. F. Sebel Co. v. Hessee*, 214 F.2d 459, 462 (10th Cir. 1954) (A *nunc pro tunc* order "is no warrant for the entry of an order to record that which was omitted to be done.") In other words, if something did not happen in the first instance, it cannot be corrected *nunc pro tunc*.

[6]This is truly a national problem recurring generally. While there is outright conflict between the Ninth and District of Columbia Circuits and the Fifth Circuit, the resolution in other Circuits must be politely described as confused and guidance from here would clearly be useful. Compare *United States v. Pogany*, 465 F.2d 72 (3rd Cir. 1972), with *United States v. DiGilio*, 538 F.2d 972 (3rd Cir. 1976); compare *Rose v. United States*, 513 F.2d 1251 (8th Cir. 1975), with *Roach v. Bennett*, 319 F. Supp. 79 (D. Iowa 1970).

statute requires it. 18 U.S.C. § 4244 says in so many words that a person shall have his competency hearing, if one is warranted, "after arrest, and *prior* to the imposition of sentence." (Emphasis added). In this case the competency hearing was held *after* the imposition of sentence by a good many years.

If Congress had wished to provide for a retroactive competency hearing, it could have done so; it did not. Instead, Congress provided a three step, pre-sentencing procedure for determining whether a defendant is competent to stand trial. First, on motion by the Government, by defense counsel or by the court *sua sponte*, the defendant must be examined by a psychiatrist if there is any reasonable ground to believe that the defendant is not competent. *Krupnick v. United States*, 264 F.2d 213 (8th Cir. 1959). Then, if that report indicates any substantial possibility that the defendant is incapable of properly assisting in his own defense, the court must hold a hearing specifically on the issue of the defendant's ability to assist counsel. *United States v. Pogany*, 465 F.2d 72 (3rd Cir. 1972). If the defendant is not found competent, the trial cannot go forward.

The legislative history of 18 U.S.C. § 4244 indicates that it was passed because of the need to sift out mental cases prior to trial. Too often, after trial and conviction, the defendant evidenced symptoms showing that he probably had not been competent to stand trial. Therefore, Congress thought it necessary to obtain the opinion of experts in the first instance to detect mental disorders which lay judges would not be able to detect, and thus avoid needless retrials.[7]

[7]The legislative history is given in *Krupnick v. United States*, 264 F.2d 213, 215-16 (8th Cir. 1959); *Wear v. United States*, 218 F.2d 24, 25-26 (D.C. Cir. 1954); *Gunther v. United States*, 215 F.2d 493, 495-96 (D.C. Cir. 1954); *Perry v. United States*, 195 F.2d 37, 38 (D.C. Cir. 1952).

As the court wrote in *Sullivan v. United States*, 205 F. Supp. 545, 550 (S.D.N.Y. 1962):

> ". . . The entire thrust of the statute is to require that the determination of the accused's competency shall be made before he is actually put on trial and to avoid the repetition of the many instances prior to its enactment where defendants had been brought to trial, convicted and sentenced only to have the convictions upset because it was later demonstrated that they had in fact been mentally incompetent at the time of trial." *Accord, Kelley v. United States*, 211 F.2d 822, 825 (D.C. Cir. 1954).

It is because of this requirement that competency be determined at the earliest possible time that the Ninth and District of Columbia Circuits ruled that if the error is discovered in appeal from conviction, the error cannot be remedied *nunc pro tunc*, but instead can only be corrected by vacating the judgment and ordering a new trial if the defendant is presently competent. As the District of Columbia Circuit wrote in *Holloway v. United States*, 343 F.2d 265, 267 (D.C. Cir. 1974):

> ". . . Where the issue [the propriety of denying a pretrial competency hearing under 18 U.S.C. § 4248] is raised on direct appeal, as here, this court has several times held that an erroneous failure to grant a motion for mental examination must be corrected by remanding for a new trial, with opportunity for determination of the accused's competency to stand trial. (Citations omitted)."

Accord, Meador v. United States, 332 F.2d 935 (9th Cir. 1964); *United States v. Irvin*, 450 F.2d 968 (9th Cir. 1971); *Morris v. United States*, 414 F.2d 258 (9th Cir. 1969); *Hansford v. United States*, 365 F.2d 920 (D.C. Cir. 1966); *Kelley v. United States*, 221 F.2d 822 (D.C. Cir. 1954).

This Court recognized the propriety of that procedure in

Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). In *Dusky*, a competency hearing was held at which several psychiatric reports and expert testimony were before the court. The trial court rejected all expert testimony and found the defendant competent. That decision was affirmed in *Dusky v. United States*, 271 F.2d 385 (8th Cir. 1959). This Court found that the record was insufficient to support a determination of competency and reversed and remanded for a new trial, saying:

> "In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment . . . of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. . . ." 362 U.S. at 403.

And, twice since *Dusky* this Court has refused to permit *nunc pro tunc* competency determinations. *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 909, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 386-87, 86 S. Ct. 836, 842-43, 15 L. Ed. 2d 815 (1966).

The statute was passed so a competency determination could be made contemporaneously with the crucial event of trial. To permit competency to be determined years later in jigsaw puzzle fashion is directly contrary to that statutory intent.

The Fifth Circuit rule allowing *nunc pro tunc* competency determinations is wrong because it is based either on habeas corpus cases seeking to protect the defendant's constitutional

rights to be competent at time of trial[8] or on cases where a competency hearing was granted in the first instance and disregards the narrower question of non-compliance with 18 U.S.C. § 4244. The habeas corpus procedure involves a collateral attack on a judgment focusing not on trial errors but rather on whether the defendant was unconstitutionally put to trial. *Kaufman v. United States*, 394 U.S. 217, 89 S. Ct. 1068, 22 L. Ed. 2d 227 (1969); *Pate v. Robinson*, *supra*, 383 U.S. at 385-86. Likewise, some courts hold if there was a competency hearing in the first instance then *nunc pro tunc* competency determinations are possible. *Gunther v. United States*, 215 F.2d 493 (D.C. Cir. 1954). However, in light of *Dusky*, *supra*, it is doubtful if retrospective determinations are possible even if a competency hearing has taken place.

The Fourth, Ninth, District of Columbia and Sixth Circuits all explicitly recognize the difference between collateral attacks on judgment where competency hearings either were not held or were held improperly and direct appeals from wrongful denials of competency hearings. For instance, in *Connor v. Wingo*, 429 F.2d 630 (6th Cir. 1970), the court wrote:

> ". . . This case [Dusky] was a direct appeal from a conviction in a federal district court—not an appeal from a district court's denial of a petition for writ of habeas corpus attacking the state court conviction. . . ." 429 F.2d at 639.

[8]The conviction of an accused while he is mentally incompetent is a violation of the defendant's Fifth Amendment due process rights and possibly his Sixth Amendment rights to confront his accusers. *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); *Bishop v. United States*, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956).

Accord, United States v. Taylor, 437 F.2d 371, 382-83, n.3 (4th Cir. 1971); *Meador v. United States*, 332 F.2d 935 (9th Cir. 1964); *Holloway v. United States*, 343 F.2d 265 (D.C. Cir. 1964).

The Fifth Circuit, however, has ignored the distinction. *United States v. McEachern*, 465 F.2d 833 (5th Cir. 1972); *United States v. Roca-Alverez*, 451 F.2d 843 (5th Cir. 1971); *Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (en banc); *Lewellyng v. United States*, 320 F.2d 104 (5th Cir. 1963).

The facts of the instant case show why a *nunc pro tunc* competency hearing is inappropriate. The trial judge's easy confidence that he could determine competency two and one-half years after seeing the defendant at trial and that all those Menninger experts who relied upon their "esoteric" specialties of neurology, psychology and psychiatry were not worthy of consideration is satirized by the events. The subsequent extensive brain surgery which so clearly confirms the rejected expert testimony makes a mockery of the trial judge's complacency. This case confirms the wisdom of the statute which commands a "prior" examination with expert testimony.

The wholesale refusal of the trial court to consider expert testimony on the issue of competence demonstrates why, if there are to be retroactive determinations of competency, the finding can not stand if not supported by some expert testimony. 18 U.S.C. § 4244 was enacted because the courts needed the "advice of trained psychiatrists * * * in the detection of mental disorders which may not be readily apparent to the eye of the layman." *Krupnick v. United States*, 264 F.2d 213, 216-17 (8th Cir. 1959). The need to support a finding of competency on substantial medical testimony is reinforced by the terms of 18 U.S.C.

§ 4244 which states in pertinent part:

> ". . . If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. . . ."

2. Expert testimony is especially important where the competency determination is being made years after the trial. It is the business of experts to observe individuals to determine their capacity to cope for reasons apparent or non-apparent. Laymen have no such training and are not trained when years have gone by to recall evidences of impairment with specificity. For illustration of the importance of expert testimony see *United States v. Gray*, 421 F.2d 316, 318 (5th Cir. 1970). There the court reversed a trial court's finding of competency where the expert testimony was unanimous that the defendant was incompetent and the lay testimony was, ". . . in effect . . . nothing more than they had never observed an abnormal act on the part of Gray . . ." While the court put weight on the fact that the lay witnesses did not have prolonged contact with the defendant, the main thrust was that expert testimony should be given overriding weight. This is also the conclusion of commentators in the field, *C. Smith, Psychiatric Examinations in Federal Mental Competency Proceedings*, 37 F.R.D. 111 at 171 (1964); *Note, Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 469-70. Here the expert testimony was unimpeached and uncontradicted. That being so, the decision must be reversed.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,
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November, 1976.

APPENDIX A

483 FEDERAL REPORTER 2d SERIES

UNITED STATES of America
Plaintiff-Appellee,

v.

Michael A. S. MAKRIS, Defendant-
Appellant.

No. 72-2915

United States Court of Appeals,

Fifth Circuit.

Aug. 14, 1973.

Rehearing Denied Sept. 7, 1973.

CLARK, Circuit Judge:

Michael A. S. Makris was convicted in a non-jury trial on three counts of perjury in violation of 18 U.S.C. § 1621. On appeal Makris makes three primary contentions: (1) his sworn answers to questions propounded by an examiner for the Securities and Exchange Commission were not perjurious; (2) the evidence was insufficient to support the court's finding that he was sane at the time of the alleged offenses; and (3) he was improperly denied a hearing under 18 U.S.C. § 4244 to determine his competency to stand trial.

We find that the court below erred in denying Makris the full procedural rights mandated by 18 U.S.C. § 4244, and therefore remand for further proceedings in respect to the appellant's ability at the time of trial to participate in his own defense. Regardless of the outcome of this required procedure, the remaining points raised ought to be reached now. If Makris was competent to stand trial, then such rulings end the cause. If he was not competent, the resolutions will guide any retrial that may be had.

. . . .

Prior to trial, the court on the government's motion

appointed a highly qualified psychiatrist, Dr. Alfred Vogt, to examine Makris and report to the court on his competency to understand the proceedings against him and to properly assist in his own defense. The report made as a result of the order deals extensively with the appellant's condition but only at the time of trial but also at the time of the alleged perjury. Dr. Vogt's findings are the basis for the Makris' arguments concerning both insanity at the time of the offense and competency to stand trial.

. . . .

In oral testimony Dr. Vogt amplified the opinion expressed in his written report that Makris suffered from an aberrant capacity to deal with stressful situations. The doctor explained that, while in non-stress circumstances Makris would appear normal and respond rationally, a situation which his mind perceived as threatening danger might reduce Makris to a panic state in which his cognition of external stimuli would be reduced and his responses would become random, unpredictable, and not subject to control by his ego function. Dr. Vogt opined that the SEC hearing must have been just such a stressful experience and that under such circumstances he would expect that Makris had been incapable of comprehending the questions propounded. . . . .

. . . .

(2) *Competency to Stand Trial*: 18 U.S.C. § 4244 provides for the appointment of a qualified psychiatrist to examine a person charged with a federal offense where there is reasonable cause to believe that the accused "may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." *See generally*, United States v. McEachern, 465 F.2d 833 (5th Cir. 1972). Section 4244

further provides: "If the report of the psychiatrist indicates a state of present insanity or such mental incompetency of the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto."

The report of Dr. Vogt made as a result of his appointment under § 4244 has been discussed above. In the conclusion of his report, Dr. Vogt stated:

> In reviewing the order for examination I would have to say the patient is not insane, but I do believe he has a type of incompetency [under stressful circumstances]. I believe he is capable to understand the proceedings against him, but I am not too sure how well he can participate in dealing with counsel for the purpose of participating in his own defense.

The trial judge found that this report did not indicate a state of present insanity or mental incompetency as described in § 4244 and, therefore, deemed a hearing unnecessary. We can not agree. The excerpt from the psychiatrist's report quoted above expressed the opinion that Makris had a type of incompetency which might affect his ability to stand trial; it put forward a well-documented doubt whether he was capable of participating in his own defense. This opinion is consistent with other aspects of the report which suggested that under stressful circumstances, which undoubtedly would include a criminal prosecution, Makris might behave irrationally or inconsistently in an attempt to avoid unpleasant consequences. Since the report as a whole indicated a substantial possibility that the defendant was then incapable "properly to assist in his own defense, . . ." under the mandatory provisions of § 4244 the court should have held a hearing specifically on the issue of the ability of the defendant to assist

his counsel prior to beginning of trial.

The failure to conduct such a hearing does not, however, necessarily mandate reversal of Makris' conviction. Only if the appellant was, in fact, incompetent at the time of trial could a failure to hold the hearing required by 18 U.S.C. § 4244 be an error which affected his substantive rights. Gunther v. United States, 94 U.S.App.D.C. 243, 215 F.2d 493, 497 (1954). Here the psychiatrist's report, coupled with sworn testimony of defense counsel that the defendant had hindered their efforts by his inconsistent and unresponsible behavior, indicated that the defendant may have been incapable of effectively participating in his own defense. But these indications are by no means conclusive on that issue. The description of Makris' conduct by his trial counsel is equally consistent with the behavior of a fully-rational and self-controlled individual who was attempting to make useful suggestions to his attorneys.

In this judge-tried cause it borders on the anomolous to remand for a hearing especially in view of the lengthy suppression hearing which delved so deeply in Makris' sanity and his competency to understand the warnings given to him at the time of the SEC proceedings. However, because of the lack of a hearing and specific findings on the mental condition of appellant on the date of trial, we are unable to make an adequate review of the decision by the district court to proceed with the appellant's trial. Section 4244 commands that we remand for further proceedings on this issue. *See* United States v. McEachern, *supra*; United States v. Roca-Alvarez, 451 F.2d 843, 848 (5th Cir. 1971); Whalen v. United States, 367 F.2d 468, 470 (5th Cir. 1966); Lewellying v. United States, 320 F.2d 104, 106 (5th Cir. 1963).[8]

On remand it will first be the duty of the district court to determine whether it can conduct an adequate and meaningful hearing for the purpose of determining *nunc pro tunc* Makris' competency to stand trial in June 1972. United States v. McEachern, *supra*, 465 F.2d at 839-840 (5th Cir. 1972); Lee v. Alabama, 386 F.2d 97, 108 (5th Cir. 1967) (en banc), on remand, 291 F.Supp. 921, 926-927 (M.D.Ala.1967), aff'd, 406 F.2d 466 (5th Cir.), cert. denied, 395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246 (1969). Despite the intrinsic problems of such a retrospective determination, see Dusky v. United States, 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed. 824 (1960); Pate v. Robinson, 383 U.S. 375, 387, 86 S.Ct. 836, 843, 15 L.Ed.2d 815 (1966), in the present case the possibility of an adequate hearing at this time is greatly enhanced by the fact that the trial court will have the benefit of testimony from the court-appointed physician who examined the defendant shortly before trial as well as its own personal observation of the appellant during trial. *See, e. g.,* United States v. Lewellyng, *supra*, on remand, 229 F.Supp. 458 (N.D.Tex.1963). These observations may, of course, be supplemented by such additional evidence as the prosecution and defense develops during the Section 4244

8. This court has consistently rejected the rule followed in the Ninth Circuit where a successful appeal from failure to comply the procedures set out in 18 U.S.C. § 4244 results in the vacation of judgment rather that remand for additional proceedings with respect to the appellant's condition at the time of trial. United States v. Irvin, 450 F.2d 968 (9th Cir. 1971); Morris v. United States, 414 F.2d 258 (9th Cir. 1969); Meador v. United States, 332 F.2d 935 (9th Cir. 1964); *also see* Holloway v. United States, 119 U.S.App.D.C. 396, 343 F.2d 265, 267 (1964); *but see* United States v. Taylor, 437 F.2d 371, 379 (4th Cir. 1971).

hearing.

If the district court concludes that it can not conduct a meaningful hearing to determine competency *nunc pro tunc*, or, if, after hearing is held, Makris is found to have been incompetent at the time of his trial, the court must grant him a new trial at such time he may be found to be competent. If the hearing confirms the court's original determination of competency, Makris' conviction on Counts II and III shall stand affirmed but the court shall document its determination of competency by specific findings.[9]

Reversed, in part, and remanded.

9. On appeal, Makris argues that the court should have made specific inquiry into the voluntariness of his waiver of jury trial. This issue is closely tied to the larger question of his competency to stand trial and participate in his own defense. If on remand Makris is found to have been competent to stand trial, we hold that he is bound by his written waiver of jury trial. If he is found to have been incompetent to stand trial, the waiver will not be binding at such time as he may be retried.

APPENDIX B

UNITED STATES of America
v.
Michael A. S. MAKRIS.
Cr. No. 72-H-92.

United States District Court,
S. D. Texas,
Houston Division.
July 16, 1975.

. . . .

MEMORANDUM AND OPINION

CARL O. BUE, Jr., District Judge.

This criminal action is currently before the Court as a consequence of the mandate of the Fifth Circuit Court of Appeals in its decision *United States v. Makris*, 483 F.2d 1082 (5th Cir. 1973). Pursuant to that decision, this Court is to ascertain, first, if it is possible to conduct at the present time a hearing for the purpose of determining *nunc pro tunc* the competency of the defendant to stand trial in June, 1972, and second, depending upon the resolution of the first question, to make a finding as to the defendant's competency *vel non* during the 1972 trial and, if incompetent, to retry the defendant at such time as he is found to be competent.

BACKGROUND

This criminal action for perjury stems from the testimony of the defendant before the Securities and Exchange Commission in December, 1970, at which time defendant denied discussing with Frank Sharp a trust fund of securities allegedly belonging to refugees of Nazi Germany, denied discussing financial matters with Father Michael Kennelly of the Strake Jesuit School and denied any knowledge of a corporation

known as Bed Rock Petroleum. In a trial to the Court, defendant was found guilty of three counts of perjury. On appeal, the Circuit Court upheld this Court's determination that defendant was sane at the time that the offense was committed, but set aside the verdict of guilty with respect to Count I for insufficient evidence. Additionally, the case was remanded for the purpose of determining defendant's competency at the time of trial in view of the failure of this Court to issue specific findings in that respect and to hold a hearing for that purpose as required by 18 U.S.C. § 4244.

Defendant's allegation of incompetency at the June, 1972, trial stems from the fact that he underwent surgery in April, 1970, for the removal of a pituitary adenoma that resulted as a matter of necessity in the extensive manipulation of the frontal lobes of the brain and in the destruction of the pituitary gland itself. The principal thrust of his assertion of incompetency is that under stress he experiences deterioration of his personality to the extent that his responses are random and irrational and result in psychic and physical instability.

In an effort to comply with the mandate of the Court of Appeals, this Court required the defendant to undergo mental examinations at the Medical Center for Federal Prisoners at Springfield, Missouri, in April, 1974, for a period of thirty days. The competency hearing required by the Court of Appeals was then set for May 30, 1974. With considerable reluctance, but out of an abundance of caution, this Court continued that hearing to permit further examinations, tests and treatment of the defendant in view of his allegation that he had suffered a stroke during the latter portion of his stay at Springfield and accompanying medical testimony focusing on the potential hazards of proceeding ahead at that time.

Ultimately, the competency hearing was commenced on December 3, 1974. At that time the defendant apparently suffered some type of seizure in the courtroom. This episode resulted in his hospitalization and prompted defense counsel to move once more for a continuance. Recognizing defendant's theory of incompetency under the stress of a courtroom proceeding and the resulting procedural impasse that could confound and indefinitely delay any meaningful resolution of this case, the Court ruled that the hearing would proceed, even though it meant that the defendant would be absent for most of the testimony. (Hearing Transcript 81-91.)

Accordingly, it is necessary for the Court first to determine if it was proper for the Court to proceed with the § 4244 hearing directed by the Court of Appeals in the absence of the defendant. If such evidence can be considered, it will then be necessary for the Court to consider if it can adjudge *nunc pro tunc* the defendant's competency at the time of trial in June, 1972. Depending upon the outcome of this determination, it will be necessary for the court either to evaluate the defendant's competency at the time of trial or at the present time for purposes of retrial. Additionally, the Court must consider and resolve defendant's Motion for Judgment of Not Guilty or for Dismissal of Charges or for a New Trial premised upon his assertion that certain key medical records had been altered or omitted from those supplied to him and his counsel.

THE VIABILITY OF THE COMPETENCY HEARING IN THE ABSENCE OF THE DEFENDANT

Upon the collapse of the defendant in the courtroom

shortly after the commencement of the competency hearing on December 4, 1974, this Court proceeded to hear the expert and lay testimony from numerous witnesses over the strenuous objections of defense counsel. After review of appropriate legal authorities and an in-depth consideration of the facts leading to that decision to continue, the Court does not find that its view of the law now varies from that set forth in the Memorandum and Opinion issued on December 4, 1974. Admittedly, there is some authority elsewhere for the proposition that a competency hearing may not proceed in the absence of the defendant. *See United States v. Horowitz*, 360 F.Supp. 772 (E.D.Pa.1973); *United States v. Abrams*, 35 F.R.D. 529 (S.D.N.Y.1964), *aff'd* 357 F.2d 539 (2d Cir.), *cert. denied*, 384 U.S. 1001, 86 S.Ct. 1922, 16 L.Ed.2d 1014 (1966); *Martin v. Settle*, 192 F.Supp. 156 (W.D.Mo.1961). *Contra, Johnson v. United States*, 293 F.2d 100 (5th Cir. 1961). However, upon closer examination of the question, this Court does not believe that the absence of the defendant from the hearing in December, 1974, precludes this Court from using that proceeding to satisfy the requisites of 18 U.S.C. § 4244.

The right of a defendant to be present during a criminal proceeding rests upon a threefold basis: (1) the provisions of Rule 43 of the Federal Rules of Criminal Procedure; (2) the confrontation clause of the Sixth Amendment; and (3) the due process clause of the Fifth Amendment. For the reasons set forth below, the Court does not find that the defendant's presence at the December hearing is mandated by these provisions.

Rule 43 of the Federal Rules of Criminal Procedure provides that

> [t]he defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

Of critical importance to the determination of the Court is the question of whether a competency hearing can be considered a "stage of the trial".

The notes of the advisory committee with respect to this rule provide that the principle requiring the defendant's presence "does not apply to hearings on motions made prior to or after trial". As support for this proposition, the committee cited *United States v. Lynch*, 132 F.2d 111 (3d Cir. 1943), which held that the defendant's right to be present at his trial did not "embrace a right to be present also at the argument of motions prior to trial or subsequent to verdict". *Id.* at 113. *Accord, Williams v. United States*, 358 F.2d 325 (9th Cir. 1966); *Dunnivan v. Peyton*, 292 F.Supp. 173 (W.D. Va.1968); *Pope v. United States*, 287 F.Supp. 214, 219 (W.D.Tex.1967), *aff'd*, 398 F.2d 834 (5th Cir. 1968), *cert. denied*, 393 U.S. 1097, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). Although it may be argued that the rationale of *Lynch* is inapplicable to a hearing in which evidence in addition to argument is presented, the Fifth Circuit Court of Appeals has held that an evidentiary suppression hearing is not a " 'critical stage' of the proceedings within Rule 43 . . . ." *United States v. Gradsky*, 434 F.2d 880 (5th Cir. 1970), *cert. denied*, 401 U.S. 925, 91 S.Ct. 884, 27 L.Ed.2d 828 (1971). *See also Yates v. United States*, 418 F.2d 1228 (6th Cir. 1969). Accordingly, the Court does not find that Rule 43 requires the presence of the defendant at a *nunc pro tunc* hearing pursuant to 18 U.S.C. § 4224.

Nor does the Court find that the presence of the defendant is required by the confrontation clause of the Sixth

Amendment in order to enable defense counsel adequately to cross examine witnesses. *See Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). As a matter of law, the Fifth Circuit in *Gradsky* refused to extend the right of presence of the defendant under the Sixth Amendment to an evidentiary hearing. Furthermore, it has been recognized in other aspects of the criminal process that the presence of the defendant to aid in cross-examining is not required in proceedings not involving questions of guilt or innocence. *See United States v. Hayman*, 342 U.S. 205, 222, 72 S.Ct. 263, 96 L.Ed. 232 (1952) (Sixth Amendment does not mandate presence of defendant at § 2255 proceeding); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.2d 1337 (1949) (defendant not entitled to cross-examine witnesses supplying sentencing information).

Of signal importance, however, is that factually the circumstances at the commencement of the hearing indicate that defendant could have been of little assistance to his counsel in cross-examining witnesses. The major portion of the evidence at the competency hearing was composed of expert medical witnesses who testified with respect to matters that were not peculiarly within the knowledge of the defendant himself. Although defendant might have been able to assist his counsel in cross-examining certain of the lay witnesses, defense counsel, at the commencement of the proceeding, specifically stated on the record that defendant was of no assistance to him in conducting the hearing and requested that the defendant be allowed to remain seated at the rear of the courtroom in the company of his family. The request was granted. The Court is cognizant that defense counsel later precipitously changed his position in that regard, thereby raising some question in the eyes of this Court as to

genuineness of counsel's initial request. Separate and apart from the trial tactics employed, this Court does not find that the absence of the defendant at this hearing prejudiced him in any manner. Had he remained throughout this proceeding in the rear of the courtroom as requested, his assistance to counsel would have been minimal at best.[1]

Lastly, the Court does not find that proceeding in the absence of the defendant made the § 4244 hearing so inherently unfair as to violate the requisites of the due process clause of the Fifth Amendment. In this regard, the Supreme Court has distinguished the privilege of presence from the privilege of confrontation. *Snyder v. Massachusetts*, 291 U.S. 97, 107, 54 S.Ct. 330, 78 L.Ed. 674 (1934). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* at 107-08, 54 S.Ct. at 333. In the present case, there is little the defendant could do or gain by his presence in the rear of the courtroom. Counsel for defendant strenuously argues that if defendant were present counsel could demonstrate defendant's incompetency by giving him a series of instructions that defendant would fail to execute in the presence of the Court. Even if the Court were to assume that defendant would have performed in the manner described by counsel, the Court finds that such a demonstration could be so easily contrived as to be of little persuasiveness in the light of all other evidence adduced on the

1. The Court recognizes that the defendant may have been able to assist his counsel by supplying information relative to a business transaction between the defendant and one of his physicians, Dr. D. M. LaPere, about which defense counsel had no knowledge; however, the Court does not find this testimony significant in impeaching the doctor's credibility and has disregarded it in assessing the merits of the question now before it.

issue of competency. Accordingly, the Court does not find that the absence of the defendant from the courtroom during the proceeding violated due process as protected by the Fifth Amendment.

It should be noted that at the competency hearing the Government raised the question of whether or not the defendant, in view of the study he had made of his impairment and its symptoms, was feigning symptoms of seizure or self-inducing these attacks through regulation of his hormone replacement therapy. If such conduct had been proved, it may well have formed the basis for a determination by this Court that the defendant had waived any right that he possessed of being present at the hearing. Although there was some suggestion along these lines in the evidence, the Court does not find it of sufficient magnitude to permit any determination that the defendant purposefully waived his right to be present. Therefore, the Court's decision to proceed is in no way predicated upon a finding of waiver.

ABILITY TO CONDUCT A MEANINGFUL HEARING "NUNC PRO TUNC"

The Supreme Court has expressly recognized the problems of conducting a meaningful hearing to determine competency after the lapse of any appreciable period of time since conviction. *See Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Nonetheless, under the circumstances of the present case the Court finds that the hearing of December, 1974, is meaningful with respect to determining the defendant's competency at the time of trial in June, 1972.

Unlike the situation in *Pate*, the fact finder in this case,

the Court, had the opportunity to observe first-hand the demeanor of the witnesses and defendant during the trial of this matter. Furthermore, expert witnesses who examined the defendant during the period of trial are still available today to offer evidence with respect to the defendant's ability at that time to comprehend the nature of the proceedings against him and to assist his counsel in his defense. Thus, these experts do not need to rely upon the printed record of the trial or upon recent examinations of the defendant in order to assess what his mental ability would have been in 1972. Due to the relative proximity in time to the SEC hearing of certain business dealings involving defendant, there appeared at the hearing, in addition to the experts, numerous lay witnesses who had dealt with the defendant under various circumstances within the time frame of the trial. Accordingly, it is the opinion of this Court that the evidence adduced at the competency hearing in December, 1974, when coupled with evidence previously presented at trial, is more than sufficient to permit a meaningful adjudication of the competency of the defendant at the June, 1972, trial.

THE COMPETENCY OF THE DEFENDANT AT THE TIME OF TRIAL

In conducting the competency hearing and the trial of this matter, the Court has been continuously impressed with the voluminous evidence as to the exceptional mentality of the defendant. The consensus of those testifying in this hearing and at the trial is that the defendant was a person of unusual mental abilities prior to the removal of the pituitary adenoma. Additionally, he was considered by the majority of witnesses to be extremely affable, courteous and a very

gifted businessman. Information contained within the presentence investigation report contributes to this profile. The defendant was a licensed pilot and alleged to be a member of Mensa. The father of four children, he is reputed to be a devoted family man. He is trilingual, the result of being the son of Greek nationals, of having been partially educated in Mexico and of residing, going to school and working for a period of time in the United States. The defendant has earned a living by dealing in securities or operating various business establishments. He has previously been convicted by the United States District Court in Miami, Florida, of securities violations, which ultimately resulted in his being incarcerated for a two-year period. Although this is the only conviction of any significance on defendant's record, he has apparently been involved in a series of questionable securities transactions in Florida, Texas and Mexico that have resulted in the loss of his Florida securities broker's permit, a civil injunction against violations of the 1933 Securities Act issued by the District Court for the Southern District of Texas and his deportation from Mexico.

The allegations of defendant's incompetency at the June, 1972, trial stem from the fact that he suffers from an organic brain syndrome, the result of the removal of a pituitary adenoma in April, 1970. Because of the position of the pituitary vis a vis the brain, excision of this tumor required entering the cranial cavity through the upper part of the forehead and manipulating the frontal lobes in order to reach the center of the brain. This type of operation, according to medical experts, has resulted typically in three types of disability:

(1) a certain amount of damage to the brain resulting whenever an operation of this nature is performed;

(2) the loss to the body of the pituitary gland and its regulatory function, which requires hormone replacement therapy;

(3) psychological problems resulting from the realization of inability to perform in the same manner as prior to the operation.

The paramount question for this Court to determine is the extent of this defendant's resulting disability.

LAY TESTIMONY

From a consideration of the testimony of lay witnesses presented at the original trial in June, 1972, and the competency hearing held by this Court in December, 1974, a sequential picture of the defendant's demeanor, activities and business dealings prior to and at or about the time of trial may be formulated.

The trial testimony of Chester Jones, Dr. Jerald Senter and Maurice Powers indicates that prior to the surgery of April, 1970, the defendant was the hub of schemes to purchase Bed Rock Petroleum Company and Youngblood's Fine Foods, Inc., and that he was actively engaged in arranging for financing and providing for the transfer of corporate control, including electing new officers and obtaining possession of corporate records. Yet, throughout these transactions, defendant's name never appears as an officer of either corporation or on any note involved in financing the purchase. Both Mr. Jones and Dr. Senter testified that they saw no change in the defendant's appearance and business acumen after surgery. (Trial Transcript at 398-99; 402; 438-39; 455-57.)

Testimony of Frank Sharp, Father Michael Kennelly and Truett Peachy indicate that the defendant was actively

engaged in the summer and early fall of 1970 in a scheme to purchase Braniff Airlines and to finance this deal by obtaining a large sum of European securities that could be purchased at a fraction of their face value. Father Michael Alchediak testified to meeting with the defendant in October, 1970, and giving the defendant, at the request of Frank Sharp, 20,000 shares of Sharpstown Bank stock belonging to the Jesuit Fathers in exchange for the defendant's note in the amount of $1,000,000. Father Alchediak testified that the purpose of this transaction was to assist the defendant in freeing a large but undisclosed amount of securities located in Europe that was a part of the defendant's inheritance. Prior to this exchange, Alchediak testified that he had been sent to Europe in order to sign a letter of credit to facilitate the defendant's acquisition of the European stocks. Morton Susman, a Houston attorney and counsel to Frank Sharp, testified regarding a meeting with the defendant on December 15, 1970, in which the latter explained in detail the transaction by which he intended to acquire the stocks located in Europe. Susman testified that the defendant was able to discuss the transaction in depth and that nothing appeared unusual about his mental processes. (Trial Transcript at 604-605.)

A review of the transcript of the SEC hearing which took place on the following morning, December 16, 1970, reveals that the defendant was able to answer questions in a clear and rational manner, even though he denied knowledge of the European securities and other matters. Steve Watson, who interrogated the defendant at that interview, testified that the defendant was not remarkably nervous and that his demeanor and speech were not unusual. (Trial Transcript at 81.) Joseph Dooling, an FBI agent, who met with Frank

Sharp and the defendant on the evening of December 16, 1970, testified that nothing appeared unusual with respect to defendant's mentality and that the defendant refused to discuss the stock transaction with him upon being warned that the information volunteered might be used against him. (Trial Transcript at 716.) Likewise, in early January of 1971 the defendant was capable of going into great detail and convincing Jimmy Day, who had appeared at Frank Sharp's request, of the viability of this scheme to obtain European securities. (Trial Transcript at 531-532.) Shortly thereafter Day and Makris met in New York City where the defendant was subjected to in-depth questioning lasting one to two hours concerning the transaction by a securities lawyer with the firm of Mudge, Rose, Guthrie and Alexander. (Trial Transcript, 533-537.) Day testified that during this conference the defendant was attentive and answered questions very clearly. (Trial Transcript at 540.)

Apart from the defendant's activities regarding the large fund of securities located in Europe, it appears that he engaged in other business and personal affairs in a competent and responsible manner. Leon Brown testified that between January, 1971, and May, 1972, he did business on numerous occasions with defendant's Tidy Didy Diaper Service in Houston by dealing over the telephone with a male whose voice he knew as that of the defendant. He testified that he was complimented, allegedly by the defendant, who identified himself as "Mike", on a scheme by which he succeeded in having defendant's bank make good on a check drawn on the company's account that had previously been returned for insufficient funds. (Trial Transcript 706-710.) Of unusual significance, however, is the testimony of Ted Hirtz, who

negotiated the settlement of a lawsuit with the defendant and his counsel over a period of time between October, 1972, and August, 1973. Hirtz described the defendant as possessing the uncanny ability to work complex mathematical problems in his head. (Hearing Transcript at 34.) Attorney Hirtz further testified that defendant was a gifted man, a "consummate negotiator" with good memory recall who could be precise when he wanted to be and equally vague when it served his strategy to do so. (Hearing Transcript at 49.)

Dr. Robert Bunch, a podiatrist, attested to the defendant's rational responses during a brief medical examination for a minor foot problem just prior to trial which commenced on June 6, 1972. Likewise, Jesse Clark, a United States Probation Officer, who interviewed the defendant in depth just after his conviction on June 15, 1972, and thereafter on several occasions, confirmed the fact that the defendant related in detail his past history, indicating that any memory impairment was slight, if it existed at all. Clark also described a medical notebook compiled by the defendant with regard to tumors and brain damage as related to his physical condition and several medical books that the defendant had obtained so as to educate himself on his physical condition. (Hearing Transcript at 107.) The defendant was viewed by Clark as a very intelligent person whose competency was never in question. (Hearing Transcript at 116.)

Testimony of defendant's wife and daughter, as well as a close business associate and friend, Ted Clegg, supports the defendant's contentions that he is incompetent because, upon being subjected to certain stressful situations, he experiences a deterioration in his personality that will manifest itself by episodes of trembling, vomiting, perspiration, etc.

The members of the defendant's family testified that defendant is never permitted to travel anywhere by himself for fear that he may become ill. Testimony of defendant's counsel indicated that the defendant is not as aggressive as he was at one time in his life and that he has a tendency to avoid stressful situations. Several witnesses attested to the fact that defendant, on a number of occasions, had abruptly left a business meeting or other stressful situations, and that such departures had resulted in his vomiting and returning to his home in order to rest and regain his composure. Furthermore, witnesses testified that the defendant's facility in use of the English language has somewhat diminished as reflected by the fact that during the course of a conversation he will hesitate and grope for words.

Two of defendant's trial counsel testified as to his competency. In spite of the fact that they admitted the defendant was capable of identifying witnesses and informing counsel of the existence of documents, counsel did testify that the defendant was of no use to them in preparing for trial and that his responses to their inquiries were often illogical. However, when pressed further to describe these illogical responses, it appears that alternate legal approaches to the defense of this case had been entertained by other defense counsel who handled the litigation at an earlier stage and that these may have had some bearing on defendant's responses and the resulting misunderstandings on the part of counsel. (Trial Transcript at 650-52.)

EXPERT MEDICAL TESTIMONY

There appears to be a general consensus among the medical experts with respect to the cause and nature of defendant's organic brain syndrome. Although it is generally agreed that

the defendant's cognitive and memory functions are impaired to some extent as a consequence of the pituitary adenoma and its surgical removal, most agreed that the defendant is capable of functioning in a relatively normal fashion in non-stress situations. Thus, although defendant's intelligence quota is believed to have diminished as a result of the surgery, testimony of several witnesses indicated that he still continues to function at an intelligence level which is above normal. However, when placed in a stressful situation, it was generally recognized that the defendant's responses to his environment might become unpredictable, arbitrary or random. There was some expert testimony to the effect that certain stress could cause the total physical collapse of the defendant, and some experts attributed the incident in the courtroom at the commencement of the competency hearing to the defendant's inability to cope with the stress of his courtroom appearance. Medically, this inability to handle stress is attributable to the excision of the pituitary gland and the accompanying loss of that gland's regulatory function in determining the amount of cortisone needed by the body to deal with a given stressful situation. For the most part, the medical experts agreed that the defendant is not psychotic and that any loss of contact with reality that he may experience under such stressful circumstances is temporary. In other words, shortly after each courtroom experience he would again be able to resume routine non-stressful activities.

Furthermore, there is some expert testimony to the effect that the defendant himself recognizes his condition and can compensate for it in some manner. In this respect, Dr. Russell Settle testified that it was a regular occurrence in

his interviews with the defendant for the defendant abruptly to begin perspiring and holding his head and to leave for a short period of time. (Hearing Transcript at 504.) Dr. Settle also reported that the defendant admitted that he is able to handle stressful business situations by withdrawing, taking some medicine, resting briefly and drinking a cup of coffee with plenty of sugar. (Hearing Transcript at 579.)

It appears, however, that the medical experts disagree with respect to the extent of defendant's impairment during the course of the trial in June, 1972. Drs. Settle, Goldstein and Nagaswami, who are all associated with the Menninger Clinic in Topeka, Kansas, and who examined the defendant over two years after the trial, indicated that the defendant could not have comprehended the nature of the proceedings against him or assisted his counsel. Dr. A. H. Vogt, who examined the defendant just prior to the 1972 trial, testified then and at the competency hearing, that the defendant could understand the proceedings against him, but he was not sure if he could deal with his counsel for purposes of participating in his own defense in view of trial counsel's forthright temperament. On the other hand, doctors from the Medical Center for Federal Prisoners at Springfield, Missouri, appearing on behalf of the Government, testified that the defendant was competent to stand trial, if necessary, as of December, 1974. In view of this divergence of viewpoint, this Court finds of significance the testimony of Dr. K. D. Charalampous, who, although attesting to his belief of the defendant's competency, testified that the ability to sustain stress varies among individuals. This was confirmed by Drs. Vogt and Nagaswami who asserted that stress varies with individuals depending upon the nature of the situation at hand and the regimen

that one has been accustomed to following. Likewise, other experts testified that there is no way to accurately predict the extent of impairment that may result from manipulation of the frontal lobes of the brain in connection with excision of the pituitary gland.

ANALYSIS OF THE EVIDENCE AS TO DEFENDANT'S COMPETENCY

In assessing the defendant's individual ability to cope with the stress encountered in this criminal proceeding, the Court finds that the medical opinions are conflicting and inconclusive. In this regard, the Court finds particularly that it can give little weight to the opinions of the experts from the Menninger Clinic who examined the defendant more than two years after trial, and who were the strongest witnesses in favor of a finding of incompetency. First, it is apparent that the opinions of the Menninger staff were rendered with the experts knowing little or nothing of the defendant's history, except what the defendant and his wife told them. Although certain of these experts admitted that the tests upon which they based their diagnoses could be faked, they were generally unaware that they were dealing with an exceptional individual who was highly motivated to project his psychic and physical condition in as serious a light as possible and who had acquired considerable knowledge beforehand on his own about his admittedly highly sophisticated medical impairment. Second, it does not appear that the experts from Kansas were examining the defendant with the idea of determining his competency in a legal sense. In this regard, these experts generally believed that the defendant had come to them to learn how to cope more effectively with his present condition; they were not primarily concerned with his capacity to comprehend and assist counsel at the time of trial.

Apart from the Menninger experts, the Court is still unpersuaded by the testimony of other medical experts favoring a finding of incompetency, since it is undisputed and indeed comports with common sense that the degree of impairment stemming from a given medical malady varies among individuals. Furthermore, the Court is unpersuaded by the attestations of medical experts that lay testimony must be discounted because the defendant's impairment can be discerned only by the expert eye after close examination. Any impairment which is that obscure and esoteric can scarcely be of sufficient magnitude to render the defendant unable to understand basically what is going on in a court of law and unable to confer intelligently with his counsel in his own defense. Rather, what emerges from the lengthy record of this case and this Court's weighing of the credibility of the testimony is that this defendant is no ordinary individual who can be categorized routinely by clinical testing. There is simply no better way for a court to assess the competency of a brain-injured individual in a particular set of circumstances than to scrutinize evidence as to that individual's actual performances at various intervals within the critical time frame. Fortunately these voluminous instances, some stressful and some otherwise, shed considerable light and in their totality eliminate any reasonable doubt as to the competency of the defendant prior to and at the time of his trial in June, 1972. Accordingly, the Court finds that it is dealing with an extraordinary individual possessed of remarkable industry, ingenuity and guile and that it must rest its determination as to his competency upon the composite testimony of lay witnesses who observed the defendant pursue his sophisticated business transactions and activities under a variety of circumstances in which he would be unwilling to fake or be incapable of disguising his true mental state.

Although the defendant's wife and daughter testified that certain stressful situations caused him to tremble, perspire and become nauseated, the total picture presented by other lay witnesses indicates that the defendant is quite capable of functioning well in a number of situations that would be highly stressful to a majority of other persons. In this respect, the lay testimony offered at the trial and at the competency hearing presents the picture of a highly skilled negotiator who following the April, 1970, operation had been deeply involved in a number of questionable transactions and able to convince various highly intelligent and skilled businessmen and attorneys of the viability of his schemes while he remained aloof and behind the scenes, avoiding personal liability and personal recognition. Indeed, this is a characteristic pattern that had permeated the defendant's business dealings before the operation.

Apart from his testimony at the SEC proceeding in December, 1970, wherein the Court found the defendant to be competent, this Court has noted as examples certain other instances within the critical time period that qualify as stressful incidents which the defendant handled adroitly: (1) the negotiations and settlement of a lawsuit brought against defendant's own business by Attorney Ted Hirtz who related his extensive dealings with defendant between October, 1972, and August, 1973, including his observations of defendant's capacity during such period to perform in his head complex mathematical problems with accuracy; (2) defendant's success in persuading Frank Sharp and his advisors and thereafter Sharp's New York attorney after a one to two hour detailed interrogation in January, 1971, of the feasibility of procuring a large quantity of securities located in Europe and allegedly belonging, alternatively, to the defendant or to Nazi refugees.

Furthermore, this Court is unpersuaded by the argument that the defendant, when involved in highly complex business transactions, is not subjected to stress because he is accustomed to that type of environment, but that when required to make a courtroom appearance he will promptly experience disorientation and physical collapse. The practical convenience of such a malady cannot be overestimated—although incompetent to answer for his actions in a court of law, the defendant has been and continues to be capable of functioning in a complex business environment. The Court does not find plausible such an argument and rejects it.

In assessing the defendant's competency at the time of trial, this Court places significant weight upon its own observations of the defendant during the entire course of that proceeding. The defendant apparently was overcome by stress on several occasions during the trial when he left the courtroom for short periods. After a brief absence, the defendant returned, indicating to the Court that he was utilizing the techniques that he had acquired to compensate for this disability. Otherwise, during the course of the trial, the Court on occasion observed the defendant conferring with his counsel and responding to the Court rationally in appropriate instances. (See Trial Transcript 61-69; 1131-32; 1138; 1141.) The defendant displayed during the trial as well as at sentencing none of the physical manifestations indicative of his inability to cope with a stressful situation.

The Court has been wholly aware throughout this litigation of the nature of the defendant's illness and the surgical procedures involved. However, a serious illness in and of itself cannot compel a conclusion of legal incompetency, particularly when a detailed chronology of defendant's activities

since the April, 1970, operation directly refutes any such medical assessment. The Court therefore finds that the defendant was quite capable of understanding the nature of the proceedings against him and of assisting his counsel at his trial in June, 1972. Having so found, the Court finds it unnecessary to consider and resolve the issue as to whether the defendant is competent to stand trial at this time.[2]

DEFENDANT'S MOTION FOR JUDGMENT OF NOT GUILTY OR FOR DISMISSAL OF CHARGES OR FOR A NEW TRIAL

By this motion, defendant requests that the Court grant him a new trial because the experts who testified at defendant's trial in June, 1972, were not provided with certain medical records of M. D. Anderson Hospital. These include records of examinations of the defendant at the Endocrine Clinic on January 19, 1972, and May 24, 1972. Additionally, defendant asserts that neither he nor his counsel was provided with the medical records containing a handwritten entry dated December 3, 1971, of an examination in which the defendant reported a period of disorientation, believed by the attending physician to be a temporal lobe seizure induced by a low cortisol level.

With respect to the records of the examinations of January 19, 1972, and May 24, 1972, counsel argues that these records would have permitted defense counsel to discover that

2. The medical evidence conflicts on this point as well. Of some interest as to defendant's current capacity for employment is Dr. Settle's refusal to accept defendant's assertion when giving a history that he is able to function in a high level job but with difficulty (Hearing Transcript at 579E). The Government in its brief vigorously disputes defendant's claimed difficulties in his work and contends that it stands ready to offer convincing proof on defendant's current capacity and high earnings if the issue is reached.

low cortisol levels were revealed by tests conducted on May 24, 1972, and, subsequently, May 31, 1972. According to defense counsel, these are germane in demonstrating that the defendant was incompetent because of a hormone deficiency at the time of trial, which commenced on June 6, 1972. The Court does not find that a motion for a new trial with respect to this evidence is appropriate in view of the fact that counsel was supplied with these records prior to the competency hearing. Accordingly, this evidence, which relates to the issue of competency, was before the Court and expert witnesses at the time that the competency issue was decided. A new trial on this issue, therefore, is unnecessary.

With respect to the entry dated December 3, 1971, counsel for defendant argues that this is significant in demonstrating that the defendant could be disoriented by virtue of a temporal lobe seizure and thus could have been legally insane at the time of the SEC hearing held in December, 1970. In order to prevail on a motion for a new trial, a defendant must demonstrate the existence of four prerequisites:

(1) the evidence is newly discovered and was unknown to the defendant at the time of trial;

(2) the evidence is material and not merely cumulative or impeaching;

(3) the evidence would probably produce an acquittal; and

(4) failure to learn of the evidence was not due to lack of diligence on the part of the defendant.

See, e.g., United States v. Rachal, 473 F.2d 1338 (5th Cir. 1973.)

Assuming, for purposes of this motion, that counsel for defendant were able to satisfy the requisites numbered 1,

2 and 4, this Court does not find that the evidence of a temporal lobe seizure, experienced a year after the SEC hearing, is sufficient to demonstrate to this Court that the defendant was not responsible for his actions at the time of the hearing. In this respect, there is no evidence that the defendant's cortisol level at the time of the hearing was sufficient to induce such a seizure. Furthermore, the record of the hearing itself, as well as the observations of those involved in questioning the defendant, adequately demonstrate that he was not disoriented or out of touch with reality at that time. Therefore, the information revealed by the December 3, 1971, entry would not produce a different verdict in this case, which was tried to the Court.

CONCLUSION

Premised upon the testimony adduced at the trial and at the competency hearing, as well as the observations of this Court with respect to the defendant's behavior and physical condition during such proceedings as well as at sentencing, the Court concludes that the defendant was competent to stand trial in 1972. The Court does not reach, therefore, the issue of whether or not the defendant is competent to stand trial today. Defendant's Motion for Judgment of Not Guilty or for Dismissal of Charges or for a New Trial is denied.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,
v.
Michael A. S. MAKRIS,
Defendant-Appellant.
No. 75-3090
535 F.2d 899 (1976)
United States Court of Appeals
Fifth Circuit.
June 23, 1976.

. . . .

Before DYER and CLARK, Circuit Judges, and KRAFT,* District Judge.

CLARK, Circuit Judge:

This is the second appeal emanating from the 1972 federal perjury conviction of Michael A. S. Makris for falsely testifying before the Securities and Exchange Commission. Pursuant to the mandate of this court issued in defendant's first appeal, the district court conducted a *nunc pro tunc* competency hearing to determine whether Makris was competent to stand trial in 1972. After deciding the threshold question that a meaningful hearing was possible, the court received extensive medical and lay testimony and concluded that Makris was legally competent under the standard enunciated in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960). We affirm.

The factual background and procedural history of this litigation is detailed in our prior opinion. *United States v. Makris*, 483 F.2d 1082 (5th Cir. 1973). In brief, Makris' le-

*Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

gal problems stem from his December 1970 appearance before the SEC when he denied involvement in two allegedly fraudulent securities schemes then under investigation. In June 1972, Makris was tried and convicted under a three-count perjury indictment and given a consecutive sentence. To expedite the criminal appeals process, this court chose to resolve Makris' challenges to the sufficiency of the evidence in his direct appeal, reversing his conviction under Count I but rejecting that attack on the remaining counts.

What could not be finally decided in our prior disposition was the crucial question of defendant's competency to stand trial. In April 1970, approximately two years before trial, Makris underwent radical brain surgery for the removal of a large pituitary tumor. The operation required manipulation of the frontal lobes and destruction of the pituitary gland itself. All experts agree that the surgery left defendant impaired both physically and mentally. The extent of that impairment and the legal effects that flow therefrom are the central issues in this case.

From the outset of this litigation, the proper assessment of defendant's mental state has been of major concern. Prior to the bench trial, the judge appointed a psychiatrist to examine Makris and report on his condition to the court. In addition, the court held an extensive pretrial hearing, pursuant to a defense suppression motion, which in effect determined Makris' sanity at the time of the offense. Although affirming the district court's finding of sanity on appeal, we were constrained to hold the procedures employed deficient, in that no hearing directed to the issue of competency to stand trial had been conducted, a violation of the strictures of 18 U.S.C. § 4244. We remanded for the two-step determination of whether a meaningful *nunc pro tunc* hearing was

possible and, if so, whether Makris was fit to stand trial in 1972.

Following remand, the district court directed defendant to undergo further psychiatric evaluation at the Medical Center for Federal Prisoners at Springfield, Missouri. The tests were conducted in April 1974 and the competency hearing set for May 30, 1974. A continuance was granted when defendant alleged that he suffered a stroke during his stay at Springfield. When the hearing finally commenced on December 3, 1974, Makris apparently suffered a seizure in the courtroom. Although defendant was hospitalized and thus unable to be present for most of the hearing, the court elected to proceed. The district court held that proceeding in the defendant's absence did not violate Makris' statutory or constitutional rights. Defendant does not complain of this ruling on appeal.

The district court's lengthy opinion (reported at 398 F.Supp. 507) adequately summarizes the extensive testimony received at the competency hearing as well as evidence gleaned from the transcript of the 1972 perjury trial and the 1970 SEC hearing. Having served as the trial judge in this case, the court could also take advantage of its recollections of defendant's demeanor during the critical time-frame. The voluminous record built up pertinent to defendant's mental status contains lay and medical observations contemporaneous with the trial as well as current expert evaluation based on recent medical examination.

The picture of Makris' mental condition presented by these diverse sources is conflicting. There is no dispute, however, that prior to surgery, defendant was considered an extremely brilliant man, able to speak three languages (Greek, English, Spanish) and make a lucrative income from operating various businesses and dealing in securities. How much Makris

changed as a result of the operation is the highly contested matter. At the risk of oversimplifying, it is fair to state that the bulk of lay testimony pointed to competency, while the expert medical evidence suggested incompetency.

The many physicians who examined Makris characterized the effects of the brain surgery as an organic brain syndrome. In particular, Makris experienced difficulty with speech perception, his recent memory was impaired and his overall intellectual capacity diminished. The removal of the pituitary gland also necessitated that Makris undergo hormone replacement therapy because of his body's inability to produce and secrete cortisone. The experts explained that prescribing the correct dosage to suit an individual patient's physical and psychological needs was not a simple task. If the amount of medication were insufficient, the user might become disoriented or irrational. Finally, it was repeatedly acknowledged that the brain-damaged person might develop psychological side effects from the depressing realization that he was no longer able to function at his previous level. The doctors also emphasized that each of these three disabilities could be exacerbated by stress. In their opinion, although Makris might be able to function normally in his normal environment, when confronted with a stressful situation (such as a criminal prosecution) his responses might become unpredictable and random.

The crucial question as to what extent these admitted deficiencies operated to impair defendant's ability to understand the proceedings in 1972 and to assist his defense attorneys did not produce a single answer from the experts who testified at the competency hearing. What emerges as significant, however, is that no medical expert would categorically state that Makris was legally competent in 1972. Three witnesses from the Menninger Clinic (a psychiatrist, a psychologist and a neurologist) who conducted a weeklong evaluation of defendant in the fall of 1974 concluded that Makris was incompetent at the time of trial. In contrast, doctors from the Springfield facility refused to express any opinion on defendant's condition in 1972, but agreed that at the time of their examination in 1974 Makris was competent. A Houston psychiatrist appearing as a government witness also declined to diagnose defendant's state as of 1972 because he lacked sufficient collateral information upon which to formulate an opinion. The two experts who had the benefit of examining defendant close to the trial date agreed that Makris was incapable of assisting in his own defense. Dr. Riley, a neurologist, based his opinion on Makris,' general condition:

> The man has an organic brain syndrome. Such a person, no matter how optimal you might make all other aspects of his medical situation, cannot be relied upon to perform in a predictable and consistently meaningful way under stress.

Dr. Vogt, the psychiatrist appointed by the court to examine Makris prior to trial, concluded that defendant was unable to communicate effectively with trial counsel, partly because of his attorney's forthright temperament:

> I just don't think that he [the attorney] would sit still for waiting for Mike Makris to get himself organized, and if he pushed him, he damn sure wouldn't get him organized to give relevant and pertinent information.

In addition to live expert testimony, the court had before it medical reports from several other physicians verifying the existence and seriousness of defendant's impairment and documentary evidence indicating that Makris' cortisol level was very low just a week before trial.

Some of the evidence received from non-experts tended to corroborate the view of Makris as a brain-damaged person

likely to become incapacitated in stressful situations. Members of defendant's family testified that they never let defendant travel alone for fear he might become ill. Friends and business associates recounted how defendant left meetings abruptly, suffering from vomiting, trembling and perspiration. On occasion Makris would lose his facility with the English language and grope for words. Most significantly, two of Makris' defense attorneys testified at trial that defendant was absolutely no help in preparing for trial and that his responses to their questions were slow and illogical.

In marked contrast, several business associates and other lay witnesses who had contact with Makris during the critical time-frame related that defendant behaved in a highly competent fashion and showed no signs of debilitating mental illness. Only a few months subsequent to surgery, Makris was actively engaged in coordinating a complex financial transaction directed at acquiring a large fund of foreign securities. Witnesses appearing before the SEC in 1970 and at the perjury trial gave rather consistent accounts of Makris as a shrewd businessman who conducted his affairs remarkably well even after his surgery. Ted Hirtz, an attorney who had negotiated the settlement of a lawsuit with defendant and his counsel over a period of time ranging from October 1972 to August 1973, testified at the competency hearing that he was impressed by defendant's uncanny ability to handle mathematical computations in his head. In Hirtz's view, Makris was a fine negotiator who only departed from his usual precise manner and became "vague" when it served his purposes to do so. Jesse Clark, the probation officer who prepared Makris' presentence report and conducted five personal interviews (including a home visit) in connection therewith, described how defendant was able to recall past events

in detail and always appeared alert and intelligent at their meetings. Clark's testimony also revealed that Makris was extremely knowledgeable about brain disorders as a consequence of studying several medical texts and preparing an essay-type paper dealing with his own symptoms and problems.

As for defendant's demeanor at trial, the trial judge observed that Makris appeared normal, that he conferred with his counsel throughout the proceeding and that he responded rationally to the court's inquiries. On several occasions, however, defendant was apparently overcome by stress and forced to leave the courtroom to regain his composure. Since Makris did not take the stand, there is no hard evidence available concerning his ability to withstand vigorous questioning.

The district court's analysis of the evidence placed primary emphasis on the "composite testimony of lay witnesses" and for the most part refused to credit the medical experts' conclusions, characterizing their opinions as "conflicting and inconclusive." 398 F.Supp. at 516. What impressed the court at the outset was Makris' unusual mental abilities prior to surgery. Conceding that some impairment was a necessary concomitant to the removal of the tumor, the court relied heavily on lay descriptions of defendant's behavior to conclude that the deterioration was not so severe as to render Makris incompetent. The conclusions of the Menninger staff were accorded little weight in the court's balancing, primarily because Makris and his wife were the sources for the background information provided these experts and had never informed the doctors that they would be called upon to make a legal assessment of defendant's competency. The other medical opinions favoring incompetency were also unable to convince the court that defendant's malady would

serve to incapacitate him at trial, but would not substantially affect his business performance. While not making an express finding, the court did not rule out the possibility that Makris had at least at times faked the effects of his illness. To the district court defendant appeared as "an exceptional individual who was highly motivated to project his psychic and physical condition in as serious a light as possible." 398 F.Supp. at 516. Most importantly, the court was convinced that by the time of trial, Makris had learned to cope with his disabilities so as to minimize even the short-term negative effects of his illness. In sum, the district court concluded that the profile of Makris projected by his business associates was the true one and that the deleterious effects of his operation were substantially under control at the time of trial.

I. Meaningfulness of *Nunc Pro Tunc* Competency Hearing

In our prior opinion, we instructed the district court to make the initial determination of whether a meaningful hearing on Makris' competency could be made two and one-half years after trial. While leaving the ultimate determination to the trial court, we expressed our view that despite the inherent difficulty associated with retrospective undertakings, "in the present case the possibility of an adequate hearing at this time is greatly enhanced by the fact that the trial court will have the benefit of testimony from the court-appointed physician who examined the defendant shortly before trial as well as its own personal observation of the appellant during trial." 483 F.2d at 1092. On remand, the district court agreed that a meaningful hearing could be conducted, citing in addition to the above two factors, the availability of testimony from lay witnesses who had contact with the defendant and observed his behavior during the relevant period.

Both the Supreme Court and this circuit are acutely aware of the hazards connected with retrospective competency hearings. *See Drope v. Missouri*, 420 U.S. 162, 182, 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 387, 86 S.Ct. 836, 843, 15 L.Ed.2d 815 (1966); *Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (en banc), *on remand*, 291 F.Supp. 921 (M.D.Ala.1967), *aff'd*, 406 F.2d 466 (5th Cir.), *cert. denied*, 395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246 (1969). A concurrent determination is indisputably the preferred method for insuring an accurate assessment of defendant's mental status. Nevertheless, this court has repeatedly sanctioned *nunc pro tunc* proceedings where there is sufficient data available to guarantee reliability. *Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (en banc).

Understandably, hard and fast rules in this area have not been formulated. Like the determination of competency itself, the question of meaningfulness can be answered only by a full review of the facts of each case, taking into account the quality and quantity of available data as well as the opinion of experts.

Although clearly relevant, the time factor is not determinative. *Compare Carroll v. Beto*, 330 F.Supp. 71 (N.D.Tex. 1971), *aff'd*, 446 F.2d 648 (5th Cir. 1971) (meaningful hearing possible 23 years after trial), *with Clark v. Beto*, 283 F.Supp. 272 (S.D.Tex.1968), *aff'd*, 415 F.2d 71 (5th Cir. 1968) (no hearing possible after a lapse of 8 years). The passage of even a considerable amount of time may not be an insurmountable obstacle if there is sufficient evidence in the record derived from knowledge contemporaneous to trial. *Conner v. Wingo*, 429 F.2d 630 (6th Cir. 1970), *cert.*

denied, 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed.2d 121 (1972). Especially when defendant's mental state was at issue, the transcript of the trial itself may provide a solid starting point for reliable reconstruction of the pertinent facts. *Lee v. Alabama*, 386 F.2d 97, 112 (5th Cir. 1967) (en banc) (Thornberry, J., concurring). Mental examinations conducted close to the trial date, of course, increase the probability that the *nunc pro tunc* hearing will not be unduly speculative. *Holloway v. United States*, 119 U.S.App.D.C. 396, 343 F.2d 265 (1964). Likewise, the recollections of non-experts (including the observations of the trial judge) who had the opportunity to interact with defendant during the relevant period may in some instances provide a sufficient base upon which a fact-finder may rest his decision that even a belated determination will be accurate.

Makris does not dispute that the parties have built up a considerable record pertinent to the competency issue and certainly the district court did not suffer from any lack of available data. Rather, defendant's complaint centers around the court's treatment of the experts' conclusions as they relate to meaningfulness. The physicians who testified for the government uniformly refused to offer an opinion as to Makris' competency in 1972. Only those experts who believed defendant incompetent were willing to project backwards in time. Most significantly, the two doctors who examined Makris contemporaneously with the trial concluded that defendant was incompetent at that time.

In this appeal Makris argues that it was improper for the court to doubly disregard the experts by on the one hand concluding that a retrospective determination was possible and then rejecting the conclusions of those experts who agreed with that assessment. Further, defendant points out

the inconsistency of asserting that meaningfulness is enhanced by the availability of contemporaneous medical evidence, yet rejecting the conclusions of those witnesses in deciding the ultimate question of competency.

The deficiency of defendant's argument is that it focuses exclusively on the medical evidence. In contrast, the meaningfulness inquiry is essentially a legal one which the court must make for itself. While the experts can provide guidance, the judge is not bound to agree with their conclusions if other probative evidence points to a different result. *Cf. Mims v. United States*, 375 F.2d 135 (5th Cir. 1967). Only by reviewing the entire record, including the evidence provided by medical experts and lay persons as well, could the district court determine whether time had seriously eroded the chances of an adequate hearing. The reluctance of some physicians to express retrospective opinions is not controlling. Such hesitancy may result from an abundance of professional caution or may simply be due to a lack of familiarity or opportunity to examine the entire record. Similarly, the court is not bound to accept the experts' conclusions on the ultimate issue of competency, simply because the existence of contemporaneous factual evidence of a medical nature contributed to the court's ruling on meaningfulness. In this case, the contemporaneous lay and medical evidence can not be said to be wholly reconcilable. The existence of both types of evidence tended to increase the likelihood that a *nunc pro tunc* proceeding would be meaningful. Given the clear conflict in views, the court necessarily had to weigh one type more heavily than the other in order to reach any determination at all. Of course, the court could have concluded that the conflict itself so diminished the prospects of arriving at an accurate assessment that a retrospective hearing would

therefore be meaningless. *See Clark v. Beto*, 359 F.2d 554 (5th Cir. 1966). Equally permissible however, was the course chosen by the trial judge, *i. e.*, to resolve the conflict by giving more credence to the lay evidence. The court's ruling on meaningfulness is amply supported by the voluminous record and we refuse to disturb it on appeal.

II. Burden of Proof/Scope of Review

The advent of two recent Supreme Court decisions necessitate that before reaching the merits of this case, we reexamine preliminary questions relating to the government's burden of proof and the scope of appellate review. Although threshold inquiries, the proper standards for the district and appellate courts to apply in federal competency hearings have received little attention and the Supreme Court has yet to speak directly to these points. Makris urges us to interpret *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), to require the government to prove competency beyond a reasonable doubt before a district court may order the defendant to stand trial. In conjunction with the burden of proof standard, defendant also reads *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), as directing appellate courts to discard the clearly erroneous rule when reviewing a lower court's competency determination. We disagree with the major portion of defendant's analysis and adopt a less stringent approach in both aspects.

There can be no question that in federal criminal cases the government has the burden of proving defendant competent to stand trial at the § 4244 hearing or its *nunc pro tunc* substitute. *Conner v. Wingo*, 429 F.2d 630, 639 (6th Cir. 1970). Whether this burden can only be discharged by

proof beyond a reasonable doubt is the question to resolve in light of *Mullaney*. In that case, the Supreme Court held that a Maine statute requiring a homicide defendant to prove sudden provocation was violative of due process. In placing the burden on the state to prove the absence of mitigating factors beyond a reasonable doubt, the Court emphasized the requirement that every fact necessary to constitute the crime charged must be proven by that most stringent standard. The *Mullaney* decision did not purport to cover all potential issues raised during the course of a criminal trial if they were not directly related to the elements of the crime. To highlight that limitation, two concurring Justices expressed the view that *Mullaney* would not displace the rule that there is no constitutional requirement for the state to prove the defendant's sanity. *See Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). Moreover, the Court has affirmatively approved lesser standards for the determination of issues which do not affect the reliability of a jury verdict. In *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), the preponderance standard was sanctioned for judging the admissibility of confessions. The emphasis in *Lego* was on giving substance to the presumption of innocence. The Court made clear that even though a determination affected substantial constitutional rights, the beyond-a-reasonable-doubt standard would not be mandated unless an element of the crime was involved. *Id.* at 487, 92 S.Ct. at 625.

Were it not for the necessary interrelation between the burden of proof issue and our standard of review, we would not have to decide the burden question today. The district

court expressly found that all reasonable doubt as to defendant's competency had been eliminated by the persuasive lay testimony concerning Makris' performance and behavior. Without characterizing the standard as mandatory, the district court clearly applied the most severe test and nevertheless ruled against defendant. However, to adequately review that determination by any appellate standard, we must first decide the minimum that the government was required to prove. If competency need only be proven by a preponderance of the evidence, the lower court's competency finding will more easily pass muster on appeal.

We are persuaded by the reasoning in *Lego* that in the exercise of our supervisory power, we should adopt the preponderance standard for federal competency hearings. The Supreme Court rulings not only do not compel application of a stricter standard, they consistently point to "element of the crime" as the proper demarcation line. Further, the Court has pointed out that "[i]t is no more persuasive to impose the stricter standard of proof as an exercise of supervisory power than as a constitutional rule." *Id.* at 488 n. 16, 92 S.Ct. at 626 n. 16.

Our decision in no way undermines the due process prohibition against proceeding against incompetent defendants. The accused will continue to have the statutory and constitutional protection of an independent judicial determination of mental competency. Requiring more would unduly burden the prosecution.

There is more validity to Makris' argument on the scope of appellate review, although we also decline to adopt it in full. This Court has frequently treated mental competency as a fact question governed by a clearly erroneous or equally narrow appellate standard. *See Lee v. Alabama*, 406 F.2d

466 (5th Cir. 1969) (clearly erroneous); *United States v. Gray*, 421 F.2d 316 (5th Cir. 1970) (clearly arbitrary or unwarranted). Apparently, the rationale has been the traditional one that the district court is in the best position to judge credibility and mediate complex factual disputes.

The question of competency, of course, is a mixed question of law and fact which has direct constitutional repercussions. It thus would be improper for a federal court to give conclusive weight to a state court finding of competency without re-analyzing the facts. Reaffirming the requirement of independent federal factfinding, the Supreme Court in *Drope v. Missouri, supra,* emphasized that competency should not be cast in an operative fact mold and thus insulated from constitutional adjudication. In a footnote, the court warned against the tendency to confuse evidentiary facts with inferences and conclusions:

> But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct, or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. . . Especially in cases arising under the Due Process Clause it is important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. . . .

Id. at 175 n. 10, 95 S.Ct. at 905 n. 10.

Drope was a state court review. Thus, the Court had no specific occasion to comment upon the use of the clearly erroneous rule in federal cases. In a federal prosecution, there is of course no comparable intercourt problem with independent federal factfinding. The only controversy centers

around the deference which should be accorded the district court's initial determination. Although *Drope* does not prohibit operation of the clearly erroneous rule in the federal context, the footnote language indicates to us that we should take a hard look at the trial judge's ultimate conclusion and not allow the talisman of clearly erroneous to substitute for thoroughgoing appellate review of quasi-legal issues. This process of subjecting inferences or ultimate facts to a broader review is not novel. *See Skou v. United States*, 526 F.2d 293, 295 (5th Cir. 1976); *Galena Oaks Corp. v. Scofield*, 218 F.2d 217 (5th Cir. 1954). It is especially appropriate when constitutional rights are at stake. *Cf. Fortin v. Darlington Little League*, 514 F.2d 344, 349 (1st Cir. 1975). We stress, however, that we by no means adopt the requirement of a de novo review. We say no more than that the clearly erroneous rule is to be limited to its proper sphere. It is not to be discarded.

III. Competency

The test of mental competency under 18 U.S.C. § 4244 is whether a defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). To adequately apply this legal standard, a court must thoroughly acquaint itself with the defendant's mental condition. The medical description or classification of defendant's illness, however, does not end the inquiry. The court is faced with the difficult task of analyzing the medical and other evidence to arrive at a legal conclusion. When that determination is retrospective, the weighing process must

necessarily place greater emphasis on evidence derived from knowledge contemporaneous with the trial.

Before concluding that Makris was competent under the *Dusky* standard, the district court analyzed the evidentiary facts to arrive at a few crucial primary inferences. Since each of these inferences is amply supported by the record, our task on appeal is limited to a critical reappraisal of the court's ultimate competency determination.

In substance, the district court found that although the defendant suffered from three disabilities as a result of his surgery, he had learned to compensate for his illness. In addition to his ability to cope with stressful situations, defendant was found by the court to be a man capable of faking or exaggerating his symptoms to suit his own purposes. These faking and coping conclusions are supported by both the lay and medical evidence. For example, Makris' probation officer described how defendant had acquired considerable medical knowledge of his own condition which could have aided in projecting a false picture to the Menninger group. There was also expert testimony that defendant had admitted that he had learned to cope with stressful business situations by taking medicine, resting and drinking coffee.

Once the court made these primary factual inferences, it had only to add a few salient factors to arrive at its competency conclusion. Most important was the court's finding that the degree of impairment varies among individuals and that Makris had been a man of exceptional mentality prior to surgery. While another person might have been incapacitated by such a severe operation, the court concluded that Makris was able to function well enough to pass the *Dusky* test.

In challenging this ultimate finding, Makris primarily focuses on the court's disregard of the experts' conclusions and attacks the validity of the lay testimony. We reject the defendant's contention that the court's weighing process was deficient and hold that the court was correct in finding that the lay evidence amply rebutted the conclusions of some of the experts.

It is well settled that expert opinion is not binding on the trier of fact if there is reason to discount it. *Mims v. United States*, 375 F.2d 135 (5th Cir. 1967). Especially where the medical expert applies legal standards to arrive at a competency conclusion, he is performing a task at which only a judge is truly an expert. In the final analysis, the determination of competency is a legal conclusion; even if the experts' medical conclusions of impaired ability are credited, the judge must still independently decide if the particular defendant was legally capable of reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him.

In this case, the district court advanced two sound reasons for according little weight to the medical evidence favoring incompetency. First, the probative force of the opinions of the Menninger group were lessened by the fact that defendant and his wife provided the doctors with defendant's medical history and neglected to inform them of the patient's legal difficulties. Second and most important, the observed conduct of defendant by his friends and business associates did not correspond to the assessment of Makris as a severely brain-damaged individual incapacitated by stress. *See United States v. Makris*, 483 F.2d 1082, 1090 (5th Cir. 1973). Moreover, the lay testimony could only be described as overwhelming. It covered the entire period from just prior to surgery until well after the trial date and presented a sequential picture of Makris as a shrewd businessman who, though handicapped, was not debilitated by his physical illness. Makris' citation of *United States v. Gray*, 421 F.2d 316 (5th Cir. 1970), for the proposition that the lay testimony was insufficient to rebut contrary medical evidence is inapposite. In *Gray*, we held that

> While a lay witness's observation of abnormal acts by an accused may be of great value as evidence, *a statement that the witness never observed an abnormal act on the part of the accused is of value if, but only if, the witness had prolonged and intimate contact with the accused.*
>
> *Id.* at 318.

In contrast to *Gray*, the abundant lay testimony in this case consisted of more than mere declarations that the defendant appeared normal to his friends and associates. Rather, the vivid descriptions of defendant's business acuity and his ability to conduct complex financial transactions throughout the critical period leads to the compelling conclusion that Makris continued to be a highly competent man. It must be recognized that it does not violate due process to proceed against a man who suffers from physical or mental ailments as long as he still has the capacity to consult with his attorney and understand the proceedings.

The district court's ultimate conclusion is sound. Even if Makris experienced temporary problems during the trial, it is most probable that he was never so impaired that he functioned below the level contemplated by the *Dusky* standard. Our agreement with the district court is bolstered by the fact that there is much contemporaneous lay evidence

supporting the competency determination.

Since all other challenges raised by defendant were resolved in our prior appeal, his conviction is

AFFIRMED.

APPENDIX D

18 U.S.C. § 4244
MENTAL DEFECTIVE

§ 4244. Mental incompetency after arrest and before trial

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on

the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686.

Historical Note

Use of Appropriations. Section 3 of Act Sept. 7, 1949, provided that: "The Attorney General may authorize the use of any unexpended balance of the appropriation for "Support of United States prisoners" for carrying out the purposes of title 18, United States Code, sections 4244 to 4248, inclusive, or in payment of any expenses incidental thereto and not provided for by other specific appropriations."

Separability of Provisions. Section 4 of Act Sept. 7, 1949, provided that: "If any provision of title 18, United States Code, sections 4244 to 4248, inclusive, or the application thereof to any person or circumstance shall be held invalid, the remainder of the said sections and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

Legislative History. For legislative history and purpose of Act Sept. 7, 1949, see 1949 U.S.Code Cong.Service, p. 1928.

No. 76-718

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL A.S. MAKRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A) is reported at 483 F. 2d 1082, and its opinion on remand (Pet. App. C) is reported at 535 F. 2d 899. The opinion of the district court (Pet. App. B) is reported at 398 F. Supp. 507.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1976. A petition for rehearing was denied on September 22, 1976. On October 14, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to November 21, 1976 (a Sunday), and the petition was filed on November 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, any error in the district court's failure to afford petitioner a pre-trial competency hearing pursuant to 18 U.S.C. 4244 was cured by its holding a post-trial hearing to determine petitioner's competency at the time of trial.

2. Whether the district court gave sufficient weight to expert medical testimony in finding that petitioner had been competent to stand trial.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts of perjury before the Securities and Exchange Commission, in violation of 18 U.S.C. 1621. He was given consecutive sentences of four years' imprisonment on the first two counts and was placed on probation for five years on the third. On appeal, the court of appeals reversed petitioner's conviction on the first count for insufficiency of the evidence. The case was remanded to the district court on the other two counts for a determination of whether a meaningful hearing on petitioner's competency to stand trial *nunc pro tunc* could be conducted and, if so, whether petitioner had been competent to stand trial (Pet. App. 1a-6a). After a hearing, the district court determined both questions adversely to petitioner (Pet. App. 1b-24b). The court of appeals affirmed (Pet. App. 1c-20c).

1. The evidence at trial may be briefly summarized as follows: In December 1970 petitioner testified before the Securities and Exchange Commission concerning a securities transaction involving two companies under investigation. The Commission's inquiry included allegations that petitioner and Frank Sharp had offered a share in a

Swiss trust containing $200 million in blue-chip securities to a Jesuit order in return for the seed money necessary to purchase the securities. Petitioner testified falsely at the Commission hearing concerning financial conversations he had had with the Jesuit order and his familiarity with a petroleum company whose securities were involved. 483 F. 2d 1084, 1088.

2. In April 1970, approximately eight months before his false testimony and over two years before trial, petitioner underwent brain surgery for the removal of a pituitary adenoma, a type of surgery that often affects behavior, personality and mental condition. Prior to trial, the district court appointed a psychiatrist, Dr. Alfred Vogt, to examine petitioner pursuant to 18 U.S.C. 4244 and to report on his competency to understand the proceedings against him and to assist in his defense, as well as on his mental condition at the time of the offense. In his report to the court and in testimony offered at a pre-trial hearing on petitioner's motion to suppress his testimony before the Commission, Dr. Vogt stated that, in his opinion, the brain surgery had made it impossible for petitioner to control his behavior in stressful situations. Despite these conclusions, the trial judge found that the evidence did not indicate a state of present insanity or mental incompetency, within the meaning of Section 4244, and it therefore did not hold a pre-trial hearing on petitioner's competency to stand trial.

On petitioner's first appeal, the court of appeals disagreed with the district court, concluding that since the psychiatrist's "report as a whole indicated a substantial possibility that [petitioner] was then incapable 'properly to assist in his own defense, . . .' under the mandatory provisions of §4244 the court should have held a hearing specifically on the issue of the ability of [petitioner] to assist

his counsel prior to the beginning of trial" (Pet. App. 3a-4a). The court observed, however, that "[o]nly if [petitioner] was, in fact, incompetent at the time of trial could a failure to hold the hearing required by 18 U.S.C. §4244 be an error which affected his substantive rights" (*id.* at 4a). It therefore remanded for a determination of whether an adequate and meaningful hearing for the purpose of determining *nunc pro tunc* petitioner's competency to stand trial in June 1972 could be held and, if so, whether petitioner had been competent at that time (*id.* at 5a-6a).[1]

3. At the remand hearing, the testimony of a number of lay witnesses who had had an opportunity to observe petitioner closely during the entire period from just prior to surgery until well after the trial established that petitioner was a highly intelligent and shrewd individual who, although handicapped, was not debilitated by his illness or incompetent to handle his affairs (Pet. App. 11b-15b). The expert medical testimony, however, was less conclusive. Dr. Vogt, who had examined petitioner prior to trial, testified that petitioner could understand the nature of the proceedings against him, but he was not certain that petitioner was able to cooperate with his counsel. Doctors from the Medical Center for Federal Prisoners at Springfield, Missouri, who had examined petitioner in December 1974, testified that petitioner was then competent to stand trial, but they did not voice any opinion as to his status in 1972. On the other hand, psychiatrists from the Menninger Clinic, who also had examined petitioner in 1974, indicated a belief that he had not been competent to stand trial in 1972. In addition, there was evidence that petitioner had learned to handle stressful situations by

[1]Petitioner sought review of the court of appeals' judgment, but this Court denied certiorari. 415 U.S. 914.

withdrawing, taking medicine, resting briefly, and drinking coffee with sugar in it. Finally, there was a general consensus of expert opinion that petitioner was capable of functioning normally in non-stress situations and that a person's ability to sustain stress despite pituitary gland surgery varied from individual to individual (*id.* at 16b-18b).

On the basis of this evidence, the district court concluded that petitioner had been competent to stand trial in June 1972. The court noted that it had had the opportunity to observe petitioner first-hand during the trial (in which it had acted as finder of fact) and it recalled that on several occasions when petitioner apparently had been overcome by stress, he had left the courtroom for short periods of time, which indicated that petitioner had "utiliz[ed] the techniques that he had acquired to compensate for this disability" (Pet. App. 21b). The court also noted that petitioner had conferred with counsel during trial and had responded rationally when questioned and that he had "displayed during the trial as well as at sentencing none of the physical manifestations indicative of his inability to cope with a stressful situation" (*ibid.*). The court's determination that petitioner had been capable of understanding the proceedings against him and of assisting his defense in June 1972 was based primarily on the "composite testimony of lay witnesses" rather than on the conclusions of the medical experts, which it found to be "conflicting and inconclusive" (*id.* at 18b-19b) and totally at odds with the observed conduct of petitioner by his business associates and by the court (*id.* at 20b-22b).

4. The court of appeals affirmed in a comprehensive opinion on which we substantially rely (Pet. App. 1c-20c). The court agreed that a meaningful *nunc pro tunc* determination of petitioner's competency could be made, observing that "the district court did not suffer from any lack

of available data" (*id.* at 10c), and it concluded, after a thorough review of the evidence, that the lower court's finding that petitioner had been competent to stand trial was sound (*id.* at 19c).

ARGUMENT

1. Petitioner's principal claim (Pet. 8-14) is that the court of appeals erroneously concluded that, in the circumstances of this case, the failure to hold a pre-trial competency hearing could be cured by a *nunc pro tunc* determination of competency after trial. In petitioner's view, whenever the district court neglects to hold a competency hearing required by 18 U.S.C. 4244 before trial, the conviction must be vacated and the defendant accorded a new trial, regardless of the feasibility of making a knowledgeable *nunc pro tunc* determination. This contention, we submit, finds support neither in the provisions of Section 4244, which do not suggest that the failure to hold a pre-trial competency hearing may never be remedied after trial, nor in common sense, since it would result in the reversal of convictions in cases where a defendant's substantive rights were not violated and the outcome of his trial was unaffected by the error. Moreover, contrary to petitioner's assertions, the holding of the court of appeals does not conflict with the decisions of this Court or of other circuits.

It is important to note at the outset that, unlike *Drope* v. *Missouri*, 420 U.S. 162, or *Pate* v. *Robinson*, 383 U.S. 375, this is not a case in which the defendant's competency to stand trial was ignored by the district court prior to trial. Nor is this case like *Dusky* v. *United States*, 362 U.S. 402, where although there had been a psychiatric examination and a hearing held to determine the defendant's competence, the evidence adduced was insufficient to "support the findings of competency to stand trial." *Ibid.* To the contrary, as we have already mentioned, petitioner's

mental state was a major concern at the time of trial: the district court ordered a pre-trial examination of petitioner by a psychiatrist, made a finding of competency after examining the expert's report, and held a pre-trial hearing on the issue of petitioner's competency at the time he testified before the Commission.

Thus, rather than engaging in a wholesale disregard of the relevant statutory provisions, the district court's only error here was its factual determination that the psychiatrist's report did not "indicate[] a state of present insanity or such mental incompetency in the accused" as to require a hearing on his ability to stand trial. In these circumstances, the court of appeals correctly concluded that petitioner's conviction need not be vacated unless, on remand, the district court was unable to make a meaningful and adequate *nunc pro tunc* competency determination. The court reasoned that, if the available evidence on remand allowed the trial judge to reach an informed conclusion about petitioner's competency in June 1972, this post-trial determination would be an adequate substitute for a pre-trial hearing, and any error in the court's failure precisely to follow the procedures outlined in Section 4244 would be harmless.

The court of appeals' holding that Section 4244 does not mandate a blanket prohibition of retrospective determinations of competency is not inconsistent with *Drope*, *Pate* or *Dusky*, each of which rejected a *nunc pro tunc* competency hearing on the basis of the particular facts of that case. Indeed, the Court's repeated observations that such determinations are inherently difficult (see *Pate* v. *Robinson*, *supra*, 383 U.S. at 387; *Drope* v. *Missouri*, *supra*, 420 U.S. at 183)—rather than impossible—strongly suggest that, in an appropriate case, the procedure followed by the courts below would be proper.

Similarly, the court of appeals' decision does not conflict with those of other circuits, several of which have held that the failure of the trial court to order a competency hearing prior to trial does not necessarily result in the vacation of the conviction and may be cured by a *nunc pro tunc* determination of competency if there is sufficient evidence in the record to make an accurate assessment possible. See *United States* v. *DiGilio*, 538 F. 2d 972, 989 (C.A. 3); *Rose* v. *United States*, 513 F. 2d 1251, 1257 (C.A. 8); *Tanner* v. *United States*, 434 F. 2d 260, 262 (C.A. 10), certiorari denied, 402 U.S. 912; *Conner* v. *Wingo*, 429 F. 2d 630, 639-640 (C.A. 6).[2]

Although petitioner contends (Pet. 8 n. 6, 10) that the Ninth and District of Columbia Circuits have ruled that the failure to hold a competency hearing prior to trial "cannot be remedied *nunc pro tunc*, but instead can only be corrected by vacating the judgment and ordering a new trial if the defendant is presently competent," this is incorrect. The Ninth Circuit, sitting *en banc*, has recently concluded that, despite "the difficulties inherent in *nunc pro tunc* hearings held for this purpose, we do not believe that they

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[2]Petitioner attempts to distinguish these and other cases by suggesting that many of them involved collateral, rather than direct, attacks on a conviction (Pet. 11-13). Since petitioner recognizes, however, that the conviction of an accused while he is mentally incompetent would violate the Fifth and Sixth Amendments and would be subject to collateral attack (Pet. 12, n. 8), the relevance of this distinction is far from apparent. Whatever the form of the proceeding in which the issue is raised, the crucial question remains the same: was the defendant competent at the time of his trial. The decision in a particular case whether a meaningful determination of this factual question may be made *nunc pro tunc* cannot be dependent upon whether the case is a direct or collateral attack. Indeed, there should be less hesitation to attempt a *nunc pro tunc* hearing in the context of a direct appeal, since the post-trial time delay in such cases is likely to be less than in a collateral attack.

are necessarily unmanageable * * *. The threshold question is whether the circumstances surrounding the case permit a fair retrospective determination of the defendant's competency at the time of trial." *de Kaplany* v. *Enomoto*, 540 F. 2d 975, 986, n.11, certiorari denied, No. 76-5496, January 25, 1977. By the same token, while the District of Columbia Circuit has suggested in a number of cases that *nunc pro tunc* determinations of competency are rarely possible, its rejection of such procedures in particular cases has depended upon the facts of those cases (see, *e.g.*, *Holloway* v. *United States*, 343 F. 2d 265, 267 (opinion of the court), 269 (Wright, J., concurring)), and it has expressly sanctioned that result in a proper setting. See *Gunther* v. *United States*, 215 F. 2d 493, 497.

In sum, we do not disagree with the view that a *nunc pro tunc* competency determination is an inherently difficult one, to be attempted only in the rare case in which the contemporaneous record is sufficiently clear. But the court of appeals did not contest this proposition, acknowledging that a "concurrent determination is indisputably the preferred method for insuring an accurate assessment of [an accused's] mental status" and that retrospective competency hearings are appropriate only "where there is sufficient data available to guarantee reliability" (Pet. App. 9c). The court therefore expressly instructed the trial judge to determine petitioner's competency on remand only if a reliable and intelligent finding could be made and to grant a new trial if an adequate competency determination was not possible. The district court's detailed finding that there was sufficient reliable evidence of petitioner's competence to stand trial in June 1972 is correct and does not warrant further review.

2. Petitioner also contends (Pet. 14) that the district court erred in failing to give "overriding weight" to certain expert medical testimony bearing on his competency to stand trial.

"Like criminal responsibility," however, "incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority." Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 470 (1967). Contrary to petitioner's contentions, the trial judge did not fail to consider the expert testimony in this case, and that testimony was not "unimpeached and uncontradicted" (Pet. 14). The court thoroughly analyzed the medical opinions and found them to be "conflicting and inconclusive" (Pet. App. 18b), unreliable for a number of reaons,[3] and entitled to little weight when measured against the extensive lay testimony and the judge's personal observations, which "eliminate[d] any reasonable doubt as to the competency of the [petitioner] prior to and at the time of his trial in June, 1972" (*id.* at 19b).[4] As the court of appeals correctly observed (Pet. App.18c):

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[3]Specifically, the court refused to credit the conclusions of the Menninger psychiatrists because they knew nothing of petitioner's history other than what they had been told by petitioner and his wife and because they had never been informed that they would be called upon to make a legal assessment of petitioner's competency. These medical experts believed that petitioner had come to the Menninger Clinic to learn to cope with his condition, and thus they were "not primarily concerned with his capacity to comprehend and assist counsel at the time of trial" (Pet. App. 18b). Other medical testimony supporting a finding of incompetency was found unconvincing because it suggested that petitioner's condition could incapacitate him at trial but would not substantially impair his ability to function in a complex business environment. As the court noted, "[t]he practical convenience of such a malady cannot be overestimated" (*id.* at 21b).

[4]The court of appeals agreed that the lay testimony was "overwhelming," presenting a "sequential picture of [petitioner] as a shrewd businessman who, though handicapped, was not debilitated by his physical illness" (Pet. App. 18c-19c).

United States v. *Gray*, 421 F. 2d 316 (C.A. 5), does not conflict with this decision. In that case, the court determined that

> It is well settled that expert opinion is not binding on the trier of fact if there is reason to discount it. *Mims* v. *United States*, 375 F. 2d 135 (C.A. 5). Especially where the medical expert applies legal standards to arrive at a competency conclusion, he is performing a task at which only a judge is truly an expert. In the final analysis, the determination of competency is a legal conclusion; even if the experts' medical conclusions of impaired ability are credited, the judge must still independently decide if the particular defendant was legally capable of reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
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MARCH 1977.

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the lay testimony was insufficient to rebut unanimous contrary medical evidence because none of the lay witnesses had ever had "prolonged and intimate contact with the accused." *Id.* at 318. Here, by contrast, the lay testimony "consisted of more than mere declarations that the [petitioner] appeared normal to his friends and associates" (Pet. App. 19c).

DOJ-1977-03

IN THE

Supreme Court of the United States

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 58 (2) Petitioner, Michael A. S. Makris, requests rehearing of the denial of his petition for writ of certiorari. The United States brief in opposition to that petition was filed so late that no reply could be submitted and the government's brief seriously misstates the applicable law.

Petitioner's brief was docketed in the Supreme Court on November 22, 1976, with a corrected appendix being filed on December 15, 1976. Although this Court's Rule 24 calls for filing of briefs in opposition within 30 days, petitioner

did not receive the government's brief until March 21, 1977, a full two months after it was due. Because of the lateness of that filing, petitioner was unable to file a reply brief prior to this Court's ruling. Such a reply brief is permitted by Rule 24 (4).

The primary issue is whether the trial court's failure to hold a competency hearing prior to trial as required by 18 U.S.C. § 4244 necessitates a retrial. Petitioner's opening brief cited the rule in the Ninth and District of Columbia Circuits requiring such a retrial; a conflict with the Fifth Circuit ruling in this case permitting a retrospective determination of competency. In its brief in opposition, the United States said no such rule existed in the Ninth Circuit, citing *de Kaplany v. Enomoto*, 540 F.2d 975, 986, note 11 (9th Cir. 1977), a case decided after our petition was filed. *de Kaplany* involved the denial of a petition for writ of habeas corpus arising from a state court conviction. It is not an appeal from a conviction in federal court where 18 U.S.C. § 4244 would apply.

de Kaplany did not cite the Ninth Circuit cases upon which we rely, *United States v. Irvin*, 450 F.2d 968 (9th Cir. 1971); *Morris v. United States*, 414 F.2d 258 (9th Cir. 1969); *Meador v. United States*, 332 F.2d 935 (9th Cir. 1964); and they are unaffected. Those cases specifically recognize the distinction between collateral attacks on convictions raising fundamental constitutional rights, such as a petition for writ of habeas corpus, and direct appeals from convictions where the defendant was denied his pretrial hearing as required by 18 U.S.C. § 4244. The language in *Meador* is still the law in the Ninth Circuit:

> "Where, as here, the error in failing to call for psychiatric examination before denying a section 4244 motion is determined in an appeal from the

> conviction, as a distinguished from an appeal in a collateral proceeding, and there are no special circumstances which would warrant a different disposition; we believe that the appropriate remedy is to reverse the judgment and remand the cause for a new trial, with opportunity for a determination of appellant's mental competency to participate in the new trial." 332 F.2d at 938.

That remains the rule in the Ninth Circuit and District of Columbia Circuit. Therefore the conflict, which the United States denies, does exist.

In light of this real conflict between the Circuits, this Court should hear this matter and Makris' petition for writ of certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

By John P. Frank
Andrew S. Gordon

JEFFERSON, MANESS,
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Attorneys for Petitioner

April, 1977.

CERTIFICATION

John P. Frank, counsel for petitioner Michael A.S. Makris, certifies that this petition for rehearing is presented in good faith and not for delay, and this petition is restricted to the grounds above specified.

_____

JOHN P. FRANK
By: James J. Bierbower

SUBSCRIBED AND SWORN to before me this _____ day of April, 1977.

_____

Notary Public

My Commission Expires:

_____